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REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
High Court of Chancery,

FROM THE YEAR M DCC LXXXIX TO M DCCC XVII.

WITH A DIGESTED INDEX.

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BY FRANCIS VESEY, JUN. ESQ.  
OF LINCOLN'S INN, BARRISTER AT LAW.

---

In Twenty Volumes.

VOL. XVI.

M DCCC IX....M DCCC X. XLIX AND L GEO. III.

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FROM THE LAST LONDON EDITION, WITH THE NOTES OF FRANCIS VESEY, JUN. ESQ.  
AND THE EXTENSIVE ANNOTATIONS OF JOHN E. HOVENDEN, ESQ.  
OF GRAY'S INN, BARRISTER AT LAW.

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THE WHOLE EDITED,  
WITH NOTES AND REFERENCES TO AMERICAN LAW,  
AND SUBSEQUENT ENGLISH DECISIONS,  
BY  
CHARLES SUMNER, ESQ.

Omne jus, quod est certum, aut scripto, aut moribus constat. Dubium equitatis regula examinandum est. Quæ scripta sunt, aut posita in more civitatis, nullam habent difficultatem: cognitionis sunt enim, non inventionis. At quæ consuetudinum responsis explicantur, aut in verborum interpretationes sunt posita, aut in recti prævique discrimine. . . . . Quintilian, de Jure Civili.

BOSTON:  
CHARLES C. LITTLE AND JAMES BROWN.

M DCCC XLV.

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# TABLE

## OF THE

### CASES REPORTED IN VOLUME SIXTEEN.

DOUBLY ARRANGED.

N. B.—“VERSUS” ALWAYS FOLLOWS THE NAME OF THE PLAINTIFF.

A		C	
	PAGE		PAGE
ALEPHSIN, JONES <i>v.</i>	470	Caley, Waldo <i>v.</i>	206
Angel <i>v.</i> Hadden	202	Campbell, <i>Ex parte</i>	244
Anonymous, Onslow <i>v.</i>	173	Carr, Dalton <i>v.</i>	93
“ Peel <i>v.</i>	157	Castle's Case	412
Appleyard <i>v.</i> Seton	223	Charles, <i>Ex parte</i>	256
Attorney-General <i>v.</i> Nichol	338	Charman <i>v.</i> Charman	115
		Church <i>v.</i> Barclay	435
		Cockburn <i>v.</i> Thompson	321
		Cockerell <i>v.</i> Barber	561
		Codrington <i>v.</i> Parker	469
		Cole <i>v.</i> Wade	27
		Collins <i>v.</i> Plumb	454
		Colquhoun, Franklyn <i>v.</i>	218
		Cook <i>v.</i> Broomhead	133
		Cooke, Milligan <i>v.</i>	1
		“ Roberts <i>v.</i>	451
		Corbett <i>v.</i> Corbett	407
		Cowell <i>v.</i> Simpson	275
		Crew, <i>Ex parte</i>	236
		Crutchfield, Pearce <i>v.</i>	48
B		D	
Baker <i>v.</i> Harris	397	Dalbiac <i>v.</i> Dalbiac	110
Baldwin, Echcliff <i>v.</i>	267	Dalton <i>v.</i> Carr	93
Balfour <i>v.</i> Welland	151	Daniels <i>v.</i> Davison	249
Barber, Cockerell <i>v.</i>	461	Dann, Berkeley <i>v.</i>	381
Barclay, Church <i>v.</i>	435	Davis, Jones <i>v.</i>	262
“ Hill <i>v.</i>	402		
Barford <i>v.</i> Street	135		
Barker, Preston <i>v.</i>	140		
Bax <i>v.</i> Whitbread	15		
Beckford <i>v.</i> Wildman	438		
Berkeley <i>v.</i> Dann	381		
Blamire <i>v.</i> Geldart	314		
Blyth, Grenville (Lord) <i>v.</i>	224		
Boraine's Case	346		
Bourne, <i>Ex parte</i>	145		
Broomhead, Cook <i>v.</i>	133		
Brown, Keighley <i>v.</i>	344		
Bullen <i>v.</i> Ovey	141		
Burges <i>v.</i> Lamb	174		

## Davis v. The Earl of Strath-

more . . . . .	419
Davison, Daniels v. . . . .	249
Day & Merry . . . . .	375
De Bath v. Lord Fingal . . . . .	167
De Minckuitz v. Udney . . . . .	355, 466
Douglas, Paxton v. . . . .	239
Duckworth, <i>Ex parte</i> . . . . .	416

## E

Eadon, Mossop v. . . . .	430
Echcliff v. Baldwin . . . . .	267
Evans v. Peacock . . . . .	512

## F

Fielding v. Winwood . . . . .	90
Fingal (Lord) De Bathe v. . . . .	167
Franklyn v. Colquhoun . . . . .	218
Frost v. Preston . . . . .	159

## G

Garn v. Garn . . . . .	268
Geldart, Blamire v. . . . .	314
George, Rattray v. . . . .	232
Grenville (Lord) v. Blyth . . . . .	224

## H

Hadden, Angell v. . . . .	202
Hallifax v. Wilson . . . . .	168
Harris, Baker v. . . . .	397
Herbert v. Reid . . . . .	481
Hill v. Barclay . . . . .	402
Hinchinbrook (Lord), Lord Shipbrook v. . . . .	477
Hobson, Partington v. . . . .	220
Holland v. Hughes . . . . .	111
Hutchinson, Lady Ormond v. . . . .	94
Hughes, Holland v. . . . .	111

## I

Innes v Jackson . . . . .	356
---------------------------	-----

## J

Jackson v. Innes . . . . .	356
" v. Pownal . . . . .	204
Jeffrey, Vawser v. . . . .	519
Jones v. Alephsin . . . . .	470
" v. Davis . . . . .	262

## K

Keighley v. Brown . . . . .	344
Keighly, Young v. . . . .	348

## L

Lamb, Burges v. . . . .	174
Lees, <i>Ex parte</i> . . . . .	472
Linthwaite, <i>Ex parte</i> . . . . .	235
Lloyd v. Passingham . . . . .	58
Longman v. Winchester . . . . .	269

## M

Mackay, Somerville v. . . . .	382
Mackenzie v. Mackenzie . . . . .	372
Mackintosh v. Townsend . . . . .	330
Merry, Day v. . . . .	375
Milligan v. Cooke . . . . .	1
Moody v. Walters . . . . .	283
Mossop v. Eadon . . . . .	430

## N

Naylor v. Taylor . . . . .	127
Nichol, The Attorney-Gen- eral v. . . . .	318
Nicholson v. Squire . . . . .	259
Noton, Slatter v. . . . .	197

## O

Onslow v. ——— . . . . .	173
Ormond (Lady) v. Hutchin- son . . . . .	94
Ovey, Bullen v. . . . .	141

P		T	
Parker, Codrington v. . . . .	469	Taitt, <i>Ex parte</i> . . . . .	193
Partington v. Hobson . . . . .	220	Taylor, Naylor v. . . . .	127
Passingham, Lloyd v. . . . .	59	“ Waters v. . . . .	417
Paxton v. Douglas . . . . .	239	Thompson, Cockburn v. . . . .	321
Payler, <i>Ex parte</i> . . . . .	434	Thompson, <i>Ex parte</i> . . . . .	443
Peacock v. Evans . . . . .	512	“ Williamson v. . . . .	443
“ v. Peacock . . . . .	49	Tomlinson, Wall v. . . . .	413
Pearce v. Crutchfield . . . . .	48	Townsend, Mackintosh v. . . . .	330
Peel v. ——— . . . . .	157	Twort v. Twort . . . . .	128
Philips, Read v. . . . .	436		
Pitt v. Watts . . . . .	126		
Plumb, Collins v. . . . .	454		
Poulden, <i>Ex parte</i> . . . . .	472		
Pownal, Jackson v. . . . .	204		
Preston v. Barker . . . . .	140		
“ Frost v. . . . .	159		
R		U	
		Udney, De Minckuitz v. . . . .	355, 466
S		V	
		Vawdrey, Seaman v. . . . .	390
		Vawser v. Jeffrey . . . . .	519
T		W	
Rattray v. George . . . . .	232		
Read v. Philips . . . . .	390		
Reid, Herbert v. . . . .	481		
Roberts v. Cooke . . . . .	451		
S		Wade, Cole v. . . . .	27
		Waldo v. Caley . . . . .	206
Scott, Stapylton v. . . . .	272	Wall v. Tomlinson . . . . .	413
Seaman v. Vawdrey . . . . .	390	Walters, Moody v. . . . .	283
Seton, Appleyard v. . . . .	223	Waters v. Taylor . . . . .	417
Shipbrook (Lord) v. Lord		Watson, <i>Ex parte</i> . . . . .	265
Hinchinbrook . . . . .	477	Watts, Pitt v. . . . .	126
Shirt v. Westby . . . . .	393	Welland, Balfour v. . . . .	151
Simpson, Cowell v. . . . .	275	Westby, Shirt v. . . . .	393
Slatter v. Noton . . . . .	197	Wheeler, <i>Ex parte</i> . . . . .	266
Somerville v. Mackay . . . . .	382	Wheldale v. Wheldale . . . . .	376
Squire, Nicholson v. . . . .	259	Whitbread, Bax v. . . . .	15
Stanley v. Stanley . . . . .	491	Wildman, Beckford v. . . . .	438
Stapylton v. Scott . . . . .	272	Willan v. Willan . . . . .	72, 216
Steele, <i>Ex parte</i> . . . . .	161	Williamson v. Thomson . . . . .	443
Sterling, <i>Ex parte</i> . . . . .	258	Wilson, Hallifax v. . . . .	168
Strathmore (Earl of), Da-		Winchester, Longman v. . . . .	269
vis v. . . . .	419	Winwood, Fielding v. . . . .	90
Street, Barford v. . . . .	135	Wright v. Wright . . . . .	188
		Y	
		Young v. Keighly . . . . .	348



# TABLE

## OF

### CASES CITED IN VOLUME SIXTEEN.

MANUSCRIPT, AND THOSE IN PRINT, IMPEACHED, CORRECTED, OR OTHERWISE  
PARTICULARLY NOTICED.

THIS TABLE DOES NOT EMBRACE THE CASES CITED BY THE EDITORS.

<p style="text-align: center;"><b>A</b></p> <p>ADDISON <i>v.</i> WALKER, 440, 1 Andrews <i>v.</i> Mowbray, 101</p>	<p>Douglas's Case, 70 Dyke <i>v.</i> Sylvester, 16 to 27</p>
<p style="text-align: center;"><b>B</b></p> <p>Bamfield, Clock <i>v.</i> 278 Bath (Marquis of), Montgomerie <i>v.</i> 324 Bennett, Lawes <i>v.</i> 253, 4 Blanchard <i>v.</i> Killock, 233 Brown's Case, 148 Browne, Burke <i>v.</i> 213 Burke <i>v.</i> Browne, 213 Butcher <i>v.</i> Butcher, 16 to 27</p>	<p style="text-align: center;"><b>G</b></p> <p>Gibson <i>v.</i> Kinven, 24 Gitley, Troughton <i>v.</i> 238 Greenvil <i>v.</i> Earl of Suffolk, 158</p>
<p style="text-align: center;"><b>C</b></p> <p>Carr <i>v.</i> Spencer, 121 Clock <i>v.</i> Bamfield, 278 Cornwall, Theys <i>v.</i> 267 Coss, <i>Ex parte</i>, 267 Craker <i>v.</i> Parrott, 22, 3</p>	<p style="text-align: center;"><b>H</b></p> <p>Hawkins, Woodhouse <i>v.</i> 308 Hodges <i>v.</i> Smith, 203</p>
<p style="text-align: center;"><b>D</b></p> <p>Donald, <i>Ex parte</i>, 435</p>	<p style="text-align: center;"><b>K</b></p> <p>Keck, <i>Ex parte</i>, 265 Killick, Blanchard <i>v.</i> 233 Kinven, Gibson <i>v.</i> 24</p>
	<p style="text-align: center;"><b>L</b></p> <p>Lansdown's (Lord) Case, 310 Lawes <i>v.</i> Bennett, 253, 4 Lloyd, <i>Ex parte</i>, 267 Lousada, Mocatta <i>v.</i> 16 to 27 Lyddall <i>v.</i> Weston, 395</p>

M

Mocatta *v.* Lousada, 16 to 27  
Montmerie *v.* The Marquis of  
Bath, 324  
Mowbray, Andrews *v.* 101

N

Newman *v.* Wallis, 264, 5

P

Parrott, Craker *v.* 22, 3

S

Smith, Hodges *v.* 203  
Spencer, Carr *v.* 121  
Suffolk (Earl of) Greenvil *v.* 158  
Sylvester, Dyke *v.* 16 to 27

T

Theys *v.* Cornwall, 267  
Townlow, *Ex parte*, 267  
Troughton *v.* Gitley, 238

U

Utterson *v.* Vernon, 256, 7

V

Valentia's (Lord) Case, 70  
Vernon, Utterson *v.* 256, 7

W

Walker, Addison *v.* 440, 1  
Wallis, Newman *v.* 264, 5  
Weston, Lyddall *v.* 395  
Widows, (Society of) Case, 324,  
325, 9  
Woodhouse *v.* Hawkins, 308

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**LORD ELDON, Lord Chancellor.**

**SIR WILLIAM GRANT, Master of the Rolls.**

**SIR VICARY GIBBS, Attorney General.**

**SIR THOMAS PLUMER, Solicitor General.**

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## CASES IN CHANCERY, ETC.

48 & 49 GEORGE III. 1808-9.

MILLIGAN v. COOKE.

[1805, Nov. 27; Dec. 20, 23. 1808, JULY.]

**SPECIFIC** performance decreed upon the Bill of the purchaser, with compensation for a defect of title, if to be ascertained, by reduction of the purchase-money; if not, or the Plaintiff would so take it, with an indemnity; the Defendant, the vendor, proposing an option to take it, as it was, or relinquish the contract: the defect consisting in the representation by the Particular of a Church Lease for twenty-one years, with covenants for renewals to sixty-three years: the lease being actually for lives; and the covenants limited and contingent (a).

THE Bill in this cause prayed the specific performance of an agreement for the purchase of a leasehold estate from the Defendant; and that a proper allowance, according to the conditions of sale, may be made to the Plaintiff out of the purchase-money in respect of the difference in value between the term and interest, as described in the particular of sale, and the actual interest of the Defendant. The premises, which were the subject of dispute, consisted of a mansion-house and twenty-one acres of land, at Hampstead, called Belsize. An objection was taken to the title under the following circumstances.

\* The Defendant was in possession under an assignment [\* 2]

(a) Courts of Equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties. See *ante*, note (a) *Craven v. Tickell*, 1 V. 60; note (a) *Calverley v. Williams*, 1 V. 210; note (a) *Calcraft v. Roebuck*, 1 V. 221; note (a) *Bowles v. Round*, 5 V. 508.

The general rule is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. But if the purchaser should insist upon such a performance, the Court will grant the relief only upon his compliance with equitable terms. 2 Story, Eq. Jur. § 779; *Water v. Travis*, 9 Johns. 465; *Graham v. Oliver*, 3 Beav. 124; *Wood v. Griffith*, 1 Swanst. 54.

of a lease, dated the 1st of February, 1797; whereby Lord Chesterfield, with the privity of John Stanhope, demised to Lord Loughborough, his executors, administrators, and assigns, for the term of 21 years, if the lives, named in a lease, dated the 21st of June, 1786, granted by the Dean and Chapter of Westminster to the trustees in the Will of the late Lord Chesterfield, or to be named in any renewed lease, should so long live; or if the estate and interest of Lord Chesterfield, his heirs or assigns, or John Stanhope, his heirs or assigns, should so long continue; at the yearly rent of 121*l.*; and Lord Chesterfield and Mr. Stanhope covenanted, as long as Lord Loughborough, his executors, administrators, or assigns, should hold and enjoy the premises, pay the rent, and perform the covenants, to pay all the rent, reserved in the lease of 1786, and perform all the covenants therein on the lessee's part, and to indemnify him against the same; and, whenever any of the lives therein named should drop, to renew the same lease, and at the expiration of said term of 21 years or at any time before the expiration thereof upon a surrender, when required, at the costs of Lord Loughborough, his executors, administrators, or assigns, to demise the premises to Lord Loughborough, his executors, administrators, or assigns, or to such person or persons as he or they should appoint, for a farther term of 21 years, in possession and not in reversion, subject to the same rent and covenants, as therein reserved and contained; and farther, that in case the said Earl of Chesterfield should be living at the end of such farther term, or said John Stanhope should be in possession of said premises, or at any time before, upon a surrender of such last-mentioned lease, at the like costs of Lord Loughborough, his executors, &c. that they, Lord Chesterfield and John Stanhope, would farther demise the premises for a farther term of 21 years

[\* 3] in \*possession and not in reversion, and subject to the same rents and covenants therein reserved and contained; and so continue to renew the same during their lives respectively, as aforesaid, to the end that Lord Loughborough, his executors, &c. might be enabled to hold and enjoy said premises for the term of 63 years from Lady-Day, 1796, as far as it might be in the power of Lord Chesterfield and John Stanhope respectively, and their respective heirs or assigns to demise the same; and Lord Chesterfield covenanted, that, in case he should have issue male of his body, who upon his decease should come into possession of any real or personal property, belonging to him, over and above such property as such issue male would take as tenant in tail under the late Earl's Will, and such issue male should refuse to renew, so as to make a complete title of 63 years, so far as was in the power of said Earl to covenant for, such real and personal property, so to be acquired, (the property of said Earl) by such issue male, should be liable to make good all such damages as should upon a trial at Law or a Decree in Equity be adjudged to Lord Loughborough, his executors, &c. by reason of such refusal by such issue male: and a similar covenant was therein contained on the part of John Stanhope.

The particular, upon which the sale took place, stated, that the premises are held for 21 years from Lady-Day, 1796, by lease from the Earl of Chesterfield; who holds the manor of Belsize, upon Lives under the Dean and Chapter of Westminster, with covenants to renew the same twice 21 years more, to make a complete term of 63 years. The principal objection, taken by the Plaintiff, was, that the Defendant was not entitled to those two renewals, so as to make a complete term of 63 years, as stated by the particular; that the covenant to renew was binding only upon Lord Chesterfield, and Mr. Stanhope, \* the next tenant for life, but not [\* 4] upon the issue male of either. The Plaintiff however, having obtained possession, refused an offer to cancel the agreement; and an ejectment being brought, filed the Bill.

Sir *Samuel Romilly* and Mr. *Newbolt*, for the Plaintiff, admitting, that the cases of specific performance, with a deduction from the purchase-money, with regard to a representation, that could not be made good, were upon the bill of the vendor, resisted by the purchaser, insisted, that the Equity must be reciprocal; that in such a case the vendor can no more as Defendant, than as Plaintiff, put the purchaser to the alternative, either to pay the full consideration, or to relinquish the contract; and this therefore is no more than the common case.

The *Attorney-General* [Hon. *Spencer Perceval*], Mr. *Richards*, and Mr. *Martin*, for the Defendant.—A Court of Equity will not under such peculiar circumstances decree a specific performance against the vendor; as the purchaser, if he had not taken possession, would not have been compelled to take this estate, with a defect of title: a small part bearing an extravagant rent. The effect would be great injustice to the Defendant: but there is no injustice in giving the Plaintiff the option to relinquish his purchase. He cannot claim both compensation and the benefit of these covenants. This being a church-lease, the party, dealing with the lessee, could not be ignorant, that he could give no more than the interest he had; and that any covenant for renewal must be invalid. Adverting to the nature of the property therefore, the purchaser cannot in a Court of Justice represent himself as having been misled. It was obvious, \* that there was some covenant, requiring inspection by the purchaser, before he concluded the contract. [\* 5] The covenant amounts to no more than an engagement, resting on damages, to endeavor to procure a renewal: not a warranty, that there is any thing beyond the existing term. The Plaintiff therefore must be taken to have purchased with notice, from the nature of the subject, that the representation, upon which he grounds his equity, could not apply to it.

If however the purchaser can upon the principle, *quia timet*, maintain this equity, how is the compensation to be ascertained; and is it to be recovered from the representative, if the covenant shall be carried into effect? Defect of title is not, like deficiency in quantity, a subject of compensation. Can the Master put a value upon the

covenant of Lord Chesterfield ; taking into consideration the state of his property ; the probability of his son's attaining the age of 21, and the inducement to him to grant these leases ? Of all these particulars out of Court the value is known : but they cannot be the subject of valuation here. There must be mutuality between such parties. If a person sells as tenant in fee, having only an estate for life, the purchaser cannot insist on compensation ; as the vendor must have a similar option to make the purchaser take the estate for life with compensation : which could not be maintained. So, taking the lease to be in truth only for 14 years, and the representation to be a lease for 63 years, the vendor could not compel a performance ; and therefore the purchaser cannot ; and, as it is impossible to fix upon any given sum, as the compensation, and a case may happen, in which there will be no right to it, the conclusion is, that under such circumstances a specific performance will not be decreed ; but the

[\* 6] purchaser must take such title as \* the vendor can give ; or must give up the contract altogether.

Sir *Samuel Romilly*, in reply.—A proposition, extremely doubtful, is treated as clear ; that the right of the vendor and of the purchaser to be released from the contract upon the ground of misrepresentation, is reciprocal. The situation of vendor or vendee, in the character of Defendant, claiming upon that ground, in the one case to be released from the contract, in the other to have a reduction of the purchase-money, is perfectly different. In the instance of an estate, sold tithe-free, which turned out to be subject to tithe (1) and the other strong and doubtful cases, in which a purchaser has been held to terms, very different from his contract, if he had filed the Bill, could the vendor, availing himself of his own misrepresentation, have compelled the purchaser to pay the full consideration, or give up the contract ?

The description, upon which this purchase was made, cannot possibly be quite accurate. Though church-leases are usually renewed, the renewal, as it cannot be compelled, is not certain. The objection however is not upon any misrepresentation in that respect. The value of such an interest is well known ; that it is considered as equal to a perpetuity. Many leases in Surrey, under the Archbishop of Canterbury, with a covenant for perpetual renewal, are considered as good as an absolute term of years. The objection of this purchaser is, that the only interest, which the vendor can give, is for

[\* 7] 13 years \* certain, and as many more as Lord Chesterfield shall live ; and, as to the remainder of the term contracted for, there is nothing but a covenant, to be enforced against the representative. It is said, this is an objection to the title ; and there is no instance of a reduction of the purchase-money under such circumstances. The case occurs in every instance, where the reduction is claimed from a vendor, who can make a title to part only of the prem-

(1) See *ante*, *Halsey v. Grant*, vol. xiii. 73 ; *Drewe v. Hanson*, vi. 675, and the references ; *Calcraft v. Roebuck*, i. 221 ; and the note, 226.

ises ; and there is a late case at the Rolls, *Dale v. Lister* ; in which the vendor, being the Defendant, took the objection that he ought not to be compelled to carry the agreement into execution, unless he should receive the whole purchase-money ; having described the estate as being much more valuable than it really was. The Bill prayed the specific performance of an agreement for the sale by auction of a lease under the Dean and Chapter of Norwich, usually renewed every seven years. An objection was taken ; which was referred to the Master ; as to 24 acres, limited by Will to the same uses, as far as may be, as the testator's freehold estate ; in which his son, the vendor, having the rest of the leasehold estate absolutely, was entitled for life only, with remainder to his sons and daughters in tail. The Defendant therefore could not make a good title to that part beyond his life : but as to the rest the Master's opinion was, that a good title for 21 years could be made. The Defendant insisted, that the Plaintiff might have the option to put an end to the contract ; but that the Defendant ought not to be compelled to take less than the stipulated price : but the Decree was made for a specific performance ; with a reduction of the purchase-money : the interest of the Defendant being less valuable than it had been represented to the Plaintiff.

It is said, the Master cannot properly ascertain, what the reduction should be. He will ascertain it ; having regard to all the \* circumstances ; that the probability, that the coven- [\* 8]  
ant will be performed, is very considerable ; that the representatives of Lord Chesterfield will be persons of honor. As to the small piece of land, two roods, it is true, no one would purchase that at such a price without having the house : but no one would like the house without that piece of land ; of essential value to the purchaser of the house : yet a specific performance would not have been refused upon the ground to the vendor. The effect of refusing this relief will be a temptation to hold out a wrong description ; with a view to the chance of advantage from a better offer ; or, if that should fail, to compel the purchaser to take the estate, as it is.

*July.* The Lord CHANCELLOR [ELDON].—This case is novel in its kind. The late case at the Rolls is by no means in all its circumstances applicable to it as an authority ; and in my judgment the consequences of this decision must be extremely important.

The interest in this church-lease has been treated as private family property ; and was, with other property, made the subject of leasing powers, given to the tenants for life. I am at a loss to collect accurately the meaning of all these covenants : but I can collect what was not the meaning. The lessee might have taken a covenant, that would have bound all the real and personal assets of the covenantors, if his possession should be disturbed : but he has not only omitted to take a covenant, binding Lord Chesterfield and Mr. Stanhope, their heirs, executors, &c, but there is what amounts almost to a protest against binding the heir ; and the obligation does



not extend farther than this ; that if Lord Chesterfield, or if Mr. Stanhope, shall leave a son, who should under the limitations \* become entitled to this property, that son should, [\* 9] not as executor, but to the extent of any other property, real or personal, which he should derive from Lord Chesterfield, or Mr. Stanhope, respectively, be liable to make good any loss, sustained by the lessee from not having the engagement for the term of 63 years.

With regard to the legal effect of the representation, made by the Defendant, it cannot be stated as a representation, that the Defendant either had, or could procure, *in specie*, a term of 63, or even 21, years: that is, a term, that must necessarily have that duration: the subject being described as a lease for lives from the Dean and Chapter of Westminster; who, while that lease was subsisting, could not have granted, or obliged themselves to grant, any interest beyond those lives. On the other hand the representation is, that the interest will last for 21 years; if the lives should not expire; and farther, not that those, under whom the title is derived, could necessarily procure *in specie* 42 years more, but that, relying, and proposing to the purchaser to rely, upon what is called the habit, or good-will, among these bodies, some persons covenanted, that, if renewal could be procured, they would and could give a derivative interest as long as the renewed lease would carry on the estate. That is the whole effect of it.

This purchaser therefore cannot be held to have understood more, or be allowed to say, he understood less, nor can the vendor be held to have undertaken to represent more, or be allowed to say, he undertook to represent less, than this; that Lord Chesterfield, being a lessee for three lives under the Dean and Chapter of Westminster, made a lease for 21 years; which might not expire within those lives; but, having the advantage of the good-will, afforded to such a [\* 10] \* lessee, he had under the expectation, that the renewal would take place, covenanted, that if, using his best endeavors for that purpose, he should obtain the renewals, his under-tenants should enjoy the premises *in specie* for two farther terms of 21 years each.

The vendor not having thought proper to give more explanation upon the situation of Lord Chesterfield with reference to this property than is contained in the particular, the purchaser is also entitled to say, it was represented, that, independent of the objection from the nature of the lease, the property was Lord Chesterfield's; and he as owner, subject to the rights of the Dean and Chapter of Westminster, covenanted, generally, that, if he should take derivative interests, he would create a subordinate interest to the sub-lessee. The purchaser has a right to say, the representation is not made good; but cannot represent this agreement, as entitling him to the premises *in specie* for 63 years. He can only insist upon a right to the subsisting term, with the benefit of such an estate in Lord Chesterfield as might be represented as his own; and a covenant, binding all his assets to

make good the agreement; if, using his endeavors, he should procure a term, which would enable him to prolong the interest for 63 years.

Another circumstance is, that Lord Chesterfield was but tenant for lives; and, considering this as nothing more than a naked agreement for 21 years, which he had not absolutely, as the lives might expire, the case at the Rolls would directly apply. That was the case of a church-lease for 21 years, with the habit of renewal every seven years. One of the conditions of sale being, that the vendor should guarantee the premises for 21 years, the objection, that the lessors might refuse to \*renew, could not arise: but a part of the [\* 11] premises, 24 acres, was in case of renewal to follow the uses of a settlement; under which the vendor was entitled for life only; and if this was no more than a contract for the residue of a term of 21 years, subject to three lives, the latter fact being suppressed in the representation, the cases would be precisely the same. The principle of the Decree at the Rolls was compensation; and of this species, that the Master should determine the difference in value between the absolute term of 21 years, and such an interest as might be disappointed by cesser of the lives; but might endure beyond the period of 21 years: if the Master should estimate the value of the absolute term at 1000*l.*, and subject to the contingency, at 500*l.*, the purchaser should take the premises at the latter price: the consequence being, that, if the lives should endure beyond the period of 21 years, he would have the premises as well as the compensation. In that respect the case is new; and deserves great consideration. In a conversation, which I had with the Master of the Rolls, we inclined to think, it might be right upon this reasoning: that the estate was purchased subject to a contingency, affecting its immediate value: he could not carry it to market: he could do nothing with it, that would make it absolute property in him; as if he had an absolute term of 21 years: but, as the compensation might be aggravated enormously beyond the actual value, so it might be much too small; and the Court would throw the chances together. The only other course was to adopt the principle of indemnity; either by taking security, or laying hold of part of the purchase-money; with a view to compensation; if the case should arise; and that is open to this difficulty; that the property, held subject to the question of indemnity, remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

\* This case however goes beyond that in a peculiar circumstance, which it is excessively difficult to deal with. [\* 12] I have observed, that the Plaintiff has no right to insist on having a term of 63 years *in specie*: but, taking Lord Chesterfield to be, as far as he could be, the absolute owner of this property, the Plaintiff has bought his covenant as to two additional terms of 21 years; and I agree, if subsequent leases should be obtained, those covenants would form an obligation upon the land. The purchaser therefore has bought an obligation, pressing upon all the real and personal as-

sets, which Lord Chesterfield should leave at his death, to procure from the Church a lease, which would enable him specifically to perform his covenant, so understood. What he has actually obtained is a covenant, not pressing all the real and personal assets, but short of that by the circumstance, that in terms it binds only what may be the subject of Lord Chesterfield's bounty at his death to his son, and a similar covenant from Mr. Stanhope. The subject of compensation therefore is the difference in value between those covenants: one, that should have bound all the assets, real and personal: the other in fact affecting only that property, which Lord Chesterfield may permit to go from him, and to devolve upon his eldest son. If that can be made the subject of valuation, I do not see, why it should not: but I do not know, how it is to be valued. If it cannot, the consequences will be, either, that the Plaintiff must take that interest, which he can have, with a value put upon the property, to the extent in which he can have it, (the *ratio* of that value being 4400*l.*, as the whole value of the interest for 63 years); and giving up the rest of these covenants; or on the other hand, he must have an indemnity against being disturbed by those, who can disturb him under the settlement. If it can be the subject of immediate compensation, it ought: if not, the purchaser would be entitled to all, that he \* can have certainly; with a deduction in respect of what he cannot have; throwing back the benefit of the covenants to the vendor: or he may have the benefit of the covenants, and an indemnity against those, who can claim under the settlement against his engagement.

*Dec. 23d.* For the Plaintiff it was stated, that he desired, not a reduction of the purchase-money, but an indemnity against the risk; which must not be a personal indemnity, but upon a real estate; or by part of the purchase-money, to be kept in Court; the Defendant taking the dividends.

The Lord CHANCELLOR [ELDON] said, the purchaser was entitled to that: this is a case for compensation, of a certain species; and the proper compensation is an indemnity (1); by which the loss, if it happens, will be made good; and if it does not happen, there is no occasion for compensation. His Lordship added, that, as this was a new, and very peculiar case, he would himself pen the reference to the Master.

The Decree declared, that the contract ought to be specifically performed, and carried into execution, as far as the Defendant is able to perform the same; that the vendor must be understood to have represented, that the mansion, and 21 acres 3 roods, mentioned in the particular of sale, were held for a term of 21 years from Lady-day, 1796, by a lease from the Earl of Chesterfield, and to have represented, that the Earl held the manor of Belsize, which must be

(1) See *post*, *Todd v. Gee*, vol. xvii. 273; *Balmanno v. Lumley*, 1 Ves. & Bea. 24.

taken upon the representation to include the said mansion and premises, as being himself the lessee thereof, without interest in the lease in any other or others, upon lives; and that the Earl, being himself such lessee upon lives, had demised the same for [\* 14] the term of 21 years from Lady-day, 1796, with covenants upon his part, binding himself, his heirs, executors, administrators, and assigns, to use his and their utmost endeavors to procure renewals from time to time of the lease from the Dean and Chapter, and to renew to his lessee, his executors, &c. for twice 21 years more; to make the complete term of 63 years, and at a rent of 121*l.* per annum.

The Decree farther declared, that it appears, that the vendor had such interest only in the said mansion and premises as was granted, and agreed to be granted, by the said indenture of the 1st of February, 1797; and that the assignment of the benefit of the said lease, and the covenants therein contained, ought not to be considered as an assignment of the interest in the mansion, &c. such as the particular represented as proposed for sale; and that, if the difference in value between the interest under such lease, and the interest, represented to be proposed for sale, can be ascertained, the purchaser is entitled to have such difference deducted from his purchase-money. An inquiry was directed, what was the difference between the value of the interest, so represented as proposed for sale, and the interest in the said lease; and, if the Master shall find, that he is unable to ascertain such difference in value, or, if the purchaser shall declare himself content to take such interest as can be given to him under the effect of the said lease, with such indemnity, as after-mentioned, the Master was directed to settle such security by way of indemnity, as under all the circumstances of the title it should appear just and reasonable that the Defendant should execute, to indemnify the purchaser, and those claiming under him, in case he or they should hereafter be evicted, molested, disturbed, or prevented, by reason that a title cannot be made according to the representation of the title in the particular, for the same \*enjoyment, as if [\* 15] the vendor could have made good the representation, and the contract had been carried into execution accordingly.

After Trinity Term, 1808, this cause was re-heard; the Lord Chancellor having intimated his inclination to hear it again argued and the Decree was affirmed.

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SEE, *ante*, note 6 to *Cooper v. Denne*, 1 V. 565, and the notes to *Drewe v. Hanson*, 6 V. 675.

## BAX v. WHITBREAD.

[1809, MARCH 10, 11, 13.]

EQUITABLE jurisdiction upon illusory appointment: discretionary according to the circumstances (a).

Execution of a Power of appointment among children and grand-children by giving 100*l.* to one, and 2400*l.*, the residue of the fund, to the only other object, established under the circumstances; the former being at the time of Appointment an uncertificated bankrupt; and other interests being given to him and his family by the instruments, creating and executing the Power.

Trust not disappointed by the failure or negligence of the trustee (b), [p. 26.]

IN this cause (1) a Petition of Appeal from the Decree, pronounced at the Rolls, was presented by the Plaintiffs.

Mr. *Hollist* and Mr. *William Agar*, for the Plaintiffs, representing this as an Appeal in effect from the judgment of the Master of the Rolls, in the case of *Butcher v. Butcher* (2), upon which this and two other subsequent cases (3) were determined, contended, that the cause, taken in those cases, not to go farther than actual decision upon circumstances, precisely the same, is not warranted by the various authorities upon the subject of illusory appointment;

[\* 16] and that from the earliest case, \* *Craker v. Parrott* (4), before Lord Nottingham, the inclination of the Court, exercising a discretion whether the power is fairly and justly executed, has been against a very unequal distribution. They cited also *Gibson v. Kinven* (5), *Wall v. Thurborne* (6), *Maddison v. Andrew* (7), *Pocklington v. Bayne* (8), *Bristow v. Warde* (9), *Vanderzee v. Aclom* (10), *Spencer v. Spencer* (11), *Kemp v. Kemp* (12), *Thomas v.*

(a) As to illusory appointments, see *ante*, note (a) *Kemp v. Kemp*, 5 V. 849; note (a) *Vanderzee v. Aclom*, 4 V. 771; 2 Williams, Exec. 1019, 1020; *Pocklington v. Bayne*, 1 Bro C. C. (Am. ed. 1844,) 450, 451; Sugden, Powers, (4th Lond. ed.) 491, *et seq.*

Courts of Chancery in England are now relieved from the troublesome subject of illusory appointments, by Statute of 1 Wm. IV. ch. 46; 4 Kent, Com. (5th ed.) 343, note.

(b) In no case will Equity interfere, where there has been a non-execution of a power as contra-distinguished from a trust, 1 Story, Eq. Jur. § 169, and notes § 105a. But it will execute a trust which fails from accident. *De Peyster v. Clendinning*, 8 Paige, 296; 2 Story, Eq. Jur. § 1059, 1061; *Gibbs v. Marsh*, 2 Metcalf, 250-254, 2 Kent, (5th edit.) 343, 344.

See *ante*, note (a), *Brown v. Higgs*, 4 V. 708; *Peter v. Beverley*, 10 Peters, 532.

(1) *Ante*, vol. x. 31.

(2) *Ante*, vol. ix. 382; 1 Ves. & Bea. 79; see the note, *ante*, vol. i. 310.

(3) *Mocatta v. Lousada*, *Dyke v. Sylvester*, *ante*, vol. xii. 123, 125.

(4) 2 Ch. Cas. 228; Finch. 354; 2 Freem. 18; 1 Vern. 355, stated from Lord Nottingham's mss. *ante*, vol. ix. 396.

(5) 1 Vern. 66.

(6) 1 Vern. 355,

(7) 1 Ves. 57.

(8) 1 Bro. C. C. 450.

(9) *Ante*, vol. ii. 336.

(10) *Ante*, vol. iv. 771.

(11) *Ante*, vol. v. 362.

(12) *Ante*, vol. v. 849.

*Webster* : from the Register's Book (1) : Lady Webster, having a power of appointment among younger children, which she had partly executed, by her Will appointed the remaining fund, amounting to 30,000*l.* ; giving to Lady Thomas only 100*l.* ; and to three other children 500*l.* each : all those children having been before properly provided for on marriage, or otherwise, Lady Thomas having received 20,000*l.*, on that ground the Lords Commissioners established the appointment.

Mr. *Richards*, Sir *Samuel Romilly* and Mr. *Trower*, for the Defendant Henry Caslon, in support of the Decree.

The Lord CHANCELLOR [ELDON].—This is represented as an appeal, not only from the Decree, pronounced in this cause, but also from three other judgments at the Rolls, in the cases of *Butcher v. Butcher* (2), *Mocatta v. Lousada* (3), and *Dyke v. Sylvester* (4) : \*an appeal in substance from the doctrine, which [\* 17] the Master of the Rolls thought fit to express, as I collect it from one of those cases in the following terms (5).

“Independent of circumstances, being still unable to discover any rule, by which I can ascertain, what is an illusory share, I adhere to the rule I laid down in *Butcher v. Butcher* ; that I will go as far as I am bound by authority, but no farther. Show me a case, in which a specific sum, or an equal proportion of what would be the share of each object of the appointment upon an equal division, has been held illusory, and I will in the same case make the same division : but, where I am deprived of the guidance, or freed from the compulsion of authority, I will not hold any appointment to be invalid upon that ground of objection.”

The same principle is expressed in the conclusion of that case in other words (6) :

“I must hold this appointment to be good ; adhering to the rule I laid down in *Butcher v. Butcher* ; for this sum of 33*l.* 6*s.* 8*d.* is not the same specific sum, or the same proportion of the share of each child upon an equal division, that has been in any former instance held to be illusory.”

These principles, thus stated, the Master of the Rolls appears to have conceived to be, not in opposition to, but consistent with, former authorities ; and I take it, his Honor meant to say this : “Show me a case, in which 50*l.* has been held illusory, and a case in which that \*sum is given ; and, if in the latter case it [\* 18] is the same share of the subject as the 50*l.* in the former, I will hold it illusory : but if in the latter case the sum is 51*l.*, I will not : as I cannot understand the doctrine, I will follow it as far as it has gone, but no farther.”

(1) Register's Book, 1769, fol. 323 ; Feb. 23, 1770.

(2) *Ante*, vol. ix. 282.

(3) *Ante*, vol. xii. 123.

(4) *Ante*, vol. xii. 125.

(5) *Ante*, vol. xii. 125.

(6) *Ante*, vol. xii. 126.

If a series of uniform authorities, through a course of centuries, prove, that this Court has undertaken the difficult task of judging, whether the execution of a power was reasonable, or not, using expressions more or less vague and loose, as, that the share must be reasonable, fair, a substantial share, a provision; that the power is to be exercised consistently with justice; expressions, that must distress the mind of any Judge, required to act upon principles, so explained, I should pause on giving judgment, if bound to decide upon those authorities with reference to the principle, stated in these late cases, now before me; which in effect, (and it would be better to do it in words) destroys all the authorities; as no two cases will probably ever be the same. The sum of 50*l.* being given in one family, and by one Will, it is difficult to imagine, that the identity of the sum, or the proportion, can afford the ground of determination in another family and upon another Will. The motives also, must be furnished by the same circumstances: whether good conduct or misconduct: a provision by a parent or by a third person: circumstances, if the Court is at liberty to regard them, of utility: for instance, in the case of a power to appoint between two children, and the situation in life of one of them, the effect of the appointment, may enable him to do more for the other, than if he had an equal share. If therefore it is established, that the Court has this authority to consider, whether the execution of such a trust, or power coupled with a trust, is reasonable, it seems to me better to deny the doctrine at once, than to lay down a rule, that will destroy

[\* 19] \* it in effect; looking only to sums and figures; excluding circumstances, unless in the same case; and considering in each case, merely, whether the motives, and circumstances, by which the judgment was so regulated, as among the different objects, were the same.

It is necessary to state the facts of this case accurately; which were not before the Master of the Rolls as fully, as they are before me upon this occasion. The power is given by a deed, dated the 19th of June, 1751, executed on the marriage of William Caslon and Elizabeth Cartlick. No provision was made out of any property of Caslon's: but she was entitled to the sum of 2500*l.*, Old South Sea Annuities; which in consideration of the marriage was vested in trustees, upon the trusts declared (1): in effect for the husband for life: for the wife, if she should survive him, for life; and, after the decease of both for the children and grand-children, according to the appointment of the survivor of the husband and wife; and, for want of such appointment, equally among all, who should attain the age of 21. The effect is, that in the event, which happened, the property was vested in William, the surviving son; and would remain vested in him; unless the grandson attained the age of 21. William became a bankrupt; and remained so until April, 1795; when he obtained his certificate. I remark the circumstance

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(1) See the Report, *ante*, vol. x. 31.

of his bankruptcy, as I am not prepared, and desire not to be understood, to hold, that in the execution of such a power the party exercises it fraudulently by giving a less share to a son, who is a bankrupt; and, I think, it would be difficult to maintain, that this, being the property of the mother, might not have been limited to the children, who had not become bankrupts during her life.

\* The Will of the mother is to be considered together [\* 20] with the effect of the deed, creating the power. It is necessary to look into that Will; to see, whether it affords any circumstances, if the Court can attend to them, which may assist in forming the judgment, whether under all the circumstances such an execution of the power is unreasonable in this sense; that it can be deemed illusory; and therefore a fraud upon the object of the power. It is difficult to say, there is any case decided, in which the sum of 100*l.* has been held illusory, as part of 2500*l.*: but cases have been stated, where the Court, proceeding upon the ground, that the execution was unreasonable, held sums, bearing full as large a proportion to the whole, to be illusory. There is however another way of considering it. It is obvious, that the execution of the very same power in the same manner, for instance, the sum of 100*l.* being given to one of the objects, and 2400*l.* to the other, may in one case be most unreasonable, in another most reasonable. If a father, having a power of appointing a sum of 2500*l.* between his two eldest children, and another sum of equal amount between his third and fourth, should under the former power give to his eldest son 100*l.*, and 2400*l.* to the second, and by a similar execution of the latter power give 100*l.* to his third child, and the residue to the fourth, the eldest having on his marriage received 20,000*l.* from his father, the third having received nothing either previously or by his Will, the appointment of the identical sum, which in the latter instance ought not to have the name of a provision, could not in the former be considered unreasonable.

If the grandson had died during his minority, by the effect of the instrument, creating the power, with the instrument executing it, the surviving son would have taken, not only the 100*l.* under the appointment, but the 2400*l.* also, with all the intermediate interest; and in \* considering, whether this appointment [\* 21] is illusory, with reference to the value, taken by each respectively, the value of that contingent interest in the bankrupt, depending upon the event of his nephew's death under the age of 21, must be appreciated. In that respect therefore this is not merely 100*l.* given to the bankrupt. If the testatrix had died, before he obtained his Certificate, and she must have contemplated as a possible case, that finally he might not obtain his Certificate, the assignees, taking the 100*l.*, might also have sold that contingent interest in the 2400*l.*, with all the intermediate interest, in the event of the grandson's death under the age of 21.

Those are not however the only interests, which the bankrupt has



under these instruments. The testatrix also gives him 50*l.* for mourning, and to his wife a legacy for mourning; and then disposes of what I conceive to be the bulk of her property, a letter-foundry, upon trusts; under which the bankrupt, his wife and children, take interests in a sum of 2000*l.*, the amount of an accumulation directed, and in the produce of the sale of the whole property, given in the event of the death of the grandson Henry, under the age of 21, to the children of the bankrupt, and, in failure of children, to the bankrupt and the widow of the other son.

With regard to this doctrine, it was well stated at the Bar, that a rule, which would leave mankind in a state of ignorance and uncertainty, how they are to act, when making Settlements or Wills, must have a very bad effect: but I have long thought it difficult upon the authorities to say, that there is any rule, which does not leave this subject under those difficulties. If a person, having a power of appointment among children, or other objects, in such shares, manner, and form, and at such times, as he thinks fit, is informed, [\* 22] that he is to make a provision for all the objects, \*a fair provision, that he is to give something substantial, a reasonable share, a share not illusory, to all of them, and that what is fair, substantial, reasonable, not illusory, is to be determined, not by his judgment, but by the discretion of this Court, he is not extricated from the difficulty, by which, executing such a power, he finds himself embarrassed. On the other hand I agree with Lord Alvanley, that if this Court has exercised such a discretion through centuries, has considered such a power as to be exercised *bonâ fide*, in this sense, that it is coupled with a trust, has always avowed, that it would exercise the discretion, whatever difficulties belonged to the doctrine originally, however unwelcome it would have been in the first instance, however reluctantly adopted, or however willingly disclaimed by the Court, it is difficult to say, that such a course of decision is not now to be followed. I do not understand, that the Master of the Rolls has said so: yet I doubt, whether what he has said does not in substance amount to it; and with all the deference, which is universally acknowledged to be due to him, I think it better to declare, that the Court will not abide by these decisions, than to over-rule them in effect, professing to abide by them.

It is clear, that this doctrine has prevailed through a long course of years, but not without some fluctuation. I incline to the opinion, that Lord Nottingham's Cases did not establish it, and it is material, that those cases should be very accurately examined. I cite the case of *Craker v. Parrott* (1), as it appears in 2 Chan. Cases; as, though what Lord Nottingham is there represented to have said differs in some degree from the quotation from his own manuscript in the case of *Butcher v. Butcher* (2), the words of the Will are stated, and the arguments; and you are informed, that the Chan-

[\* 23] cellor \*declined to proceed on any of the grounds, stated

(1) 2 Ch. Cas. 223.

(2) *Ante*, vol. ix. 382.

at the Bar. The case arose upon the Will of a citizen of London, declaring, that the third part of the residue of his estate, which he had power to dispose of, he entrusts his wife with during the time she shall continue his widow; and in case she shall remarry, he wills and desires her to give unto his children the remainder of his estate according as she shall think fit; and, as to the first third, he had himself stated, that it was due to his children equally. From that I should infer, at least, that it does not necessarily follow, that he meant equality as to the last third; over which he gave the power; having previously had equality in his contemplation. The conclusion in the arguments at the Bar, as to what the father, if asked, would have done, when the father was in his grave, is not very satisfactory. The Report states, that the Lord Chancellor said in effect that he went upon other reasons than were touched on at the Bar: he considered not the case as matter of power, but as a trust in the wife; which was to keep the children in obedience to her, while a widow: but when she should marry, it was likely, that the reverence of the children would not be so much as before; and therefore, though he trusted her for the children equally before, yet, when she should marry, he seems to give her a more arbitrary power: but that doth not make the children rightless.

From that passage it is not easy to deduce any principle, so satisfactory as to be attributed to Lord Nottingham. I cannot determine, whether he meant the trust implied; or construed the Will as expressing a trust; in which case there could be no question upon the execution of a power. I should have great difficulty to say upon that Will, that the testator had expressed a trust. If that was the ground, I should have understood the Will differently: the difference consisting, not in the principle, but in its [\* 24] application.

With regard to the quotation in the case of *Butcher v. Butcher*(1), which I take to be Lord Nottingham's words, from his own manuscript, speaking with all humility, I should have found it very difficult, construing that Will, to say, the wife was not entrusted with a discretion; because there was no convenience in trusting her: the only question in judicature being, not upon the convenience, but whether she was entrusted with the power. As I read the Will, whether convenient, or not, she was entrusted with that power; and, speaking with the same humility, I could not have declared in judgment, that it seemed to me very apparent, that the true meaning was an equal division. If however that was Lord Nottingham's opinion, there could be no question, whether she was entitled to make an unequal division, or as to the execution of a power.

This appears the more strong in the Case of *Gibson v. Kinven* (2); which I collect from the Register's Book; as stated in the very valuable edition (3) of Vernon, lately published. It is very useful

(1) *Ante*, vol. ix. 382.

(2) 1 Vern. 66.

(3) Edition by Mr. Raithby.

in Judgment shortly to express the principle, on which the Decree proceeds. That Decree is thus expressed :

"His Lordship declared, that cases of distribution must be judged according to the circumstances thereof; and, if no variety in the circumstances, the Court will distribute it in an equality: but in this case it was plain, the testator did intend there should be an equality amongst all his children."

[\* 25] The language is very \*important; as bearing upon the case then \*before the Court, and upon the general doctrine.

As to that particular case the Lord Chancellor has not left us to conjecture his opinion; declaring in his Decree, that it was plain the testator intended equality among all his children; and then there was no occasion to enter into any other question as to the doctrine of the Court. Besides that declaration, the Decree contains a principle, that has a general application to cases of this kind; except as it may be affected by what the Lord Chancellor calls the variety of circumstances; that in cases of this kind the distribution is to be in equality.

This I collect from the Report itself to be the doctrine, which the Lord Chancellor must have understood himself called upon to declare: a great variety of precedents of unequal distribution, ratified by the Court, having been produced to him; and with reference to that fact he thought himself called upon to make that declaration. In every period since this doctrine of illusory appointment has been acknowledged as the doctrine of the Court: forming a principle, I admit, in terms so loose, that the application of it is very difficult: but the doctrine was held by Lord Hardwicke; and clearly in *Menzey v. Walker* (1), by Lord Talbot; who, establishing, that the person, exercising the power, must give to all, says, that, if it was necessary to determine, whether that appointment was reasonable, he should have inquired into the circumstances of the daughters; meaning, I suppose, their pecuniary circumstances; and it has been said farther, that the inquiry should go to the fact, whether the provision was, not from the parent, but from another person (2).

[\* 26] Lord Thurlow also acted upon this doctrine in *Pocklington v. Bayne* (3). It is said, that case would not do at Law: but I have considerable reason to believe, Lord Thurlow thought, it would have been good at Law; and his principle, acknowledging the former doctrine, was that the Court must either leave all these appointments to take their fate, as executed, or must interpose upon this principle; that the power is intended to be executed for the benefit of all the objects; with due regard to all the circumstances, which the Court has thought itself at liberty to consider; that these are powers, accompanied with a trust, for the benefit of all; and, if the legal interest is taken, not according to the intention, the appointee is just as much a trustee as the person appointing.

(1) For. 72.

(2) *Ante*, vol. xii. 124, and the notes, 125; v. 368.

(3) Bro. C. C. 450.

The cases are well known, where the legal effect of the non-execution of a power is, that the property would go to a third person : but if the Court can see, that it is coupled with a trust to the execution of which the party looked with confidence, the failure or negligence of the trustee shall not disappoint those objects (1).

I shall not go through all the authorities. The result is, that from the time of Lord Nottingham the Court has taken upon itself the duty of exercising this discretion ; and I should feel great embarrassment, if on account of the difficulty, and the apprehension of not well exercising it, I should step aside from the path of my predecessors ; and be deterred from doing it as well as I can ; confining myself to the inquiry, whether a case precisely the same, had ever occurred ; taking, as my rule of acting, \* that cir- [\* 27] cumstance, instead of the principle decided by former cases.

I am not however under that embarrassment : my opinion being, that, taking the Court to have this discretion, under all the circumstances, by which I mean the circumstances furnished by the deed, creating the power, and by the execution of it, I am not warranted to hold this appointment illusory ; and upon that ground I affirm this Decree. It will be time enough to give my opinion upon other cases, when they arise ; but I cannot admit, that this party took only 100*l.* out of 2500*l.* He appears to me to have taken a very valuable interest beyond that.

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SEE, *ante*, the notes to S. C., 10 V. 31.

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(1) See *Brown v. Higgs*, *ante*, vol. iv. 708 ; v. 495 ; viii. 561 ; *Moggridge v. Thackwell*, 3 Bro. C. C. 517 ; *ante*, vol. i. 464 ; vii. 36.

## COLE v. WADE.

[ROLLS.—1806, JULY 30; DEC. 10, 11. 1807, AUGUST 11.]

**RESIDUARY** devise and bequest for such of the testator's relations and kindred in such proportions, &c. as his executors should think proper; recommending and advising his said trustees and executors to give the greatest share to such person and persons who in their opinion and judgment should appear to them to be his nearest relations and the most deserving; declaring his intention not to control their discretion; but that every thing relative to that disposition, who were his relations and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors, and administrators, of the survivor of them.

**A trust and a power.** The ground of the power being personal confidence, it is *prima facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee. A trust therefore, executed by the Court for the next of kin at the death of the testator according to the Statute of Distributions (a).

Joint authority determined by the death of one (b), [p. 45.]

Express bequest, or power, not controlled by the reason assigned; which, though it may aid the construction of doubtful, cannot warrant the rejection of clear words (c), [p. 46.]

**SIR CHARLES BOOTH** by his Will, dated the 8th of June, 1792, after giving several legacies and disposing of his copyhold estate, and some specific articles of \* personal estate, gave, [\* 28] devised and bequeathed, all the rest and residue of his real and personal estates, unto Francis Ruddle and George Wade, whom he appointed executors of his Will, their executors, administrators and assigns, upon the trusts after mentioned; and, directing his said

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(a) If a power of appointment is given by will to a party to distribute property among certain classes of persons, as among relations of the testator, the power is treated as a trust; and if the party dies without executing it, a Court of Equity will distribute the property among the next of kin. The cases on this point are numerous; 2 Story, Eq. Jur. § 1061, note; 1 Powell, Devises, 294, Jarman's note; Sugden, Powers, ch. 6, § 3 p. 393-398.

A power to sell cannot be executed by attorney, when personal trust and confidence are implied, for discretion cannot be delegated. But if the power be given to the donee and his assigns, it will pass by the assignment if the power be annexed to an interest in the donee. 4 Kent, Com. (5th ed.) 327. A power to an executor to sell land cannot after his death be executed by an administrator *cum testamento annexo*. The power is given to the executor as a personal trust. *Conklin v. Egerton*, 21 Wendell, 430; *Wills v. Cowper*, 2 Hammond, 124; *contra*, *Peebles v. Watts*, 9 Dana, 102; *Steele v. Morley*, Ib. 139; *Brown v. Armistead*, 6 Randolph, 594.

As to powers founded on personal confidence, 2 Williams, Exec. 693, 694.

As to the discretion to determine who are the "relations," 2 Williams, Exec. 813; *ante*, note (a), *Devisme v. Mellish*, 5 V. 529; *Green v. Howard*, 1 Bro. C. C. (Am. ed. 1844) 31, 33, note (a) and cases cited.

(b) It was a rule of the common law, that if a testator, by his will, directed his executors by name to sell, and one of them died, the others could not sell, because the words of the testator could not be satisfied. 4 Kent, Comm. (5th ed.) 325; Co. Litt. 112b, 113a, 181b; Sheppard, Touchstone, tit., Testament, 448, pl. 9; *Osgood v. Franklin*, 2 Johns. Ch. 19; *Peter v. Beverley*, 10 Peters, 533.

(c) 2 Williams, Exec. 795.

trustees and executors to pay out of the residue certain legacies, as to all the residue and remainder of his said real and personal estate, after payment and satisfaction of all his debts, funeral expenses, and legacies and annuities given and secured by him by bond to Joseph Stapley and Ann, his wife, to dispose of the same for the use and benefit of such relations and kindred as they in their discretion should think proper and in manner hereinafter mentioned ; and to that end the testator directed his said trustees and executors to make the best inquiry they could respecting his relations and kindred, and to take all such ways and means as they should think proper by advertisement in the public papers and otherwise to discover and find out, who were his relations and kindred ; and, when they should have obtained sufficient proofs to satisfy their own minds, who were his relations and kindred, and to what extent they amounted, he directed his said trustees and executors to convey and dispose of all such residue of his real and personal estate (after certain payments therein mentioned) unto and amongst such of his relations and kindred in such proportions, manner and form, as his said executors should think proper, recommending and advising his said trustees and executors to give the greatest share and proportion thereof unto such person and persons who in their opinion and judgment should appear to them to be his nearest relations and the most deserving : but he declared his will and meaning to be, that such recommendation was not to control them in their discretion ; well knowing and resting perfectly satisfied in the honor and justice of his said trustees and executors : his intention therefore \* was, [\* 29] that every thing relative to that disposition, as well who was or were or was not, his relations and kindred, and the proportions they should respectively be entitled unto of the said residuum, should be entirely in the discretion of the said trustees and executors and the heirs, executors, and administrators, of the survivor of them ; and who were not to be under the control in any manner whatsoever in any thing relative thereto ; and for the purpose of better dividing and apportioning the said residue of his real and personal estate he directed his said trustees and executors and the survivor of them and the heirs, executors and administrators, of such survivor, if they should think proper so to do, to mortgage, sell and convey, the residue of his said real and personal estate or such part or parts thereof as they in their discretion should think proper ; meaning to leave it in the discretion of his said trustees and executors to convey unto his said relations and kindred or such of them as they should think proper his said real and personal estate or any part or parts thereof in such manner and form and in such proportions and proportion, or charged with such sum or sums of money by way of annuity or annuities or otherwise to any other or others of his relations and kindred as they in their discretion should think proper : or wholly or only partly convert the same into money for the purpose of dividing the same between his said relations and kindred in such manner as his said trustees should think proper ; and he directed, that the said

Francis Ruddle and George Wade or the survivor of them, or the heirs, executors or administrators, of such survivor, should pay and divide and convey the whole of the residue of his said real and personal estate to and among his said relations and kindred in manner aforesaid within fifteen years next after his decease ; subjecting nevertheless a sufficient part thereof to the security of an annuity of 10*l.* to the said Joseph Stapley and \* his wife, and also 10*l.* a year secured to him by his bond.

The testator died in 1795. Ruddle and Wade proved the Will ; took possession of the real and personal estate ; and afterwards died : Wade who was the survivor, having by his Will, dated the 2d of February, 1801, devised and bequeathed to William and Edward Bray all the real estates of Sir Charles Booth, and all the moneys, arising therefrom, and all the personal estate of Sir Charles Booth, to hold such real estate to William and Edward Bray, their heirs and assigns for ever, and such personal estate and moneys to them, their executors, administrators, and assigns, upon trust for the purposes in the Will of Sir Charles Booth declared concerning the same ; and the testator appointed the said William and Edward Bray his executors for that specific purpose only, and not with respect to any part of his own estate ; appointing his wife and another person executors as to his own estates.

The Bill was filed by a person, claiming as heir at law and next of kin of Sir Charles Booth at the time of his death, and at the deaths of Ruddle and Wade, prayed, that the Plaintiff may be declared entitled to the whole residue of Sir Charles Booth's real and personal estates, &c.

The defendants William and Edward Bray by their answer submitted, that with respect to such parts of the trusts of the Will of Sir Charles Booth, which related to the distribution of his residuary personal estate, they, as executors, appointed by Wade for the specific purpose of carrying into execution the trusts of the Will of Sir Charles Booth, are bound, by virtue of that Will to carry the same into execution in the same manner as Wade, as such surviving \* trustee, would have been bound to do, within the time specified in the said Will, if he had lived. They suggested, that in consequence of inquiries, made by Ruddle and Wade, various persons had put in claims to be considered as relations and kindred of Sir Charles Booth ; and submitted, that an inquiry ought to be directed to ascertain the truth and extent of those claims ; in order that the Defendants William and Edward Bray may then receive the directions of the Court with respect to the manner, in which they ought to execute the trusts aforesaid, and farther to act as the Court shall direct.

By a Decree, pronounced at the Rolls, in August, 1803, the Will of Sir Charles Booth was established : and the usual accounts decreed ; and an inquiry was directed, who was the heir at law, and who were the next of kin and other relations of the testator, living at the time of his death ; and whether any of such next of kin were dead ; and, if dead, who were their personal representatives.

In December, 1803, before any Report, the Plaintiff died ; and a Bill of Revivor was filed by his heirs at law and his executors and residuary legatees.

The Master's Report stated, that at the death of the testator and at the time, when the Decree was pronounced, the late Plaintiff John Cole was the heir at law ; and that he, and other persons, named in the Report, were the second cousins, and sole next of kin. The Report also stated the claims of various persons, as relations of the testator at the time of his death ; to the extent of seventh cousins once removed.

The *Solicitor-Genetal* [Sir *Samuel Romilly*], Mr. *Richards*, Mr. *Thomson*, \* Mr. *Wetherell*, Mr. *Hall*, and Mr. [\* 32] *Raynsford*, for the personal representatives of the original Plaintiff, and the other next of kin of the testator, at the time of his death, according to the Statute of Distributions (1). Mr. *Hollist*, and Serjeant *Palmer*, for the Heirs at Law.

The general question is, whether in the event, that has happened, this residuary estate is undisposed of ; or is subject to the trusts of the Will ; and the points, to be considered for the purpose of determining that, are, first, whether the discretion, given by the testator to the persons, named by him, is confined to them, individually ; or can be exercised by other persons, representing them ; and if it may, whether it must not be executed by their general representatives, real or personal, not by other persons, specially appointed by them for the execution of that particular trust. Having stated the trust for his relations and kindred, as his executors should think proper, recommending and advising them to give the greatest proportion to such persons, who in their opinion should appear to be his nearest relations, and the most deserving, (terms, from which he seems to have been apprised of the decisions), and declaring, that he does not mean to control the discretion of his said trustees and executors, assigning the reason, that he rests perfectly satisfied in their honor and justice, he notices their representatives, as having any concern with the trust, in three instances only : in the two latter evidently meaning no more than that, if his trustees had executed so much of the trust as depended on the discretion he reposed in their honor, by declaring, who were to take, and in what proportions, but had not proceeded to make the distribution accordingly, then so much of the duty, as remained, which may be considered as merely ministerial, involving no exercise of \* the judgment, no question, to be [\* 33] referred to the honor and integrity of the persons, in whom he placed confidence, should be completed by their representatives. That sense, it must be admitted, cannot be attributed to the first passage, where the representatives are noticed : declaring his intention, that every thing, relative to that disposition, as well who were his relations and kindred, as the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors,

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(1) Stat. 22 & 23 Ch. II. c. 10.



and administrators, of the survivor of them. Besides the objection, that it might be as difficult to find the heirs of those persons, as his own, a difficulty, of which he evidently was aware, and the inconvenience from this discretion, intended to be the joint act of two persons only, or the sole act of the survivor, devolving upon several persons, of different descriptions, whose conclusions might disagree, and who might be infants, or *fèmes covert*, a project, so strange and wild can hardly be conceived as that of reposing this anxious confidence in persons, whom he could not know; depending entirely upon accident. The Court, seeing so improbable an intention upon one construction, will be disposed to adopt another; ascribing the intention to place the discretion, that was to be exercised, in the persons named, and to permit the merely ministerial duty, that might remain unexecuted, to be performed by the representatives. The testator evidently did not particularly advert to the words he was using: the survivor of the two trustees, though he must have been intended, not being there mentioned.

Secondly: if this extraordinary discretion is to be considered as capable of devolving on the persons, who might happen to be the representatives of the surviving trustee, the Defendants, William and Edward Bray, do not answer that description. The [\*34] testator, speaking of the heirs of the surviving trustee, could not contemplate any person, a total stranger, whom he might select from caprice or any other motive. As well in charity cases might the visitatorial power be made the subject of devise. The same observation applies to these persons as executors. The testator Sir Charles Booth could not intend an executor, so appointed, not the executor of his trustee, having by law in that character the distribution of *his* property, but persons, specially appointed, to execute the trusts of that Will: trusts never reposed in them.

A third question will be made; whether the trust, if it cannot be executed in any other way, must not be executed by this Court: so as to prevent intestacy. This trust so much depends upon particular discretion, that it cannot be so executed. The case of *Harding v. Glyn* (1), and others of that class cannot apply to these particular circumstances. In the great case of *Moggridge v. Thackwell* (2) the Lord Chancellor professed to proceed upon the ground, that the subject was a charity: in which cases the Court goes upon principles, totally distinct from those, which regulate all other trusts; and, compelled by authority, made the Decree most reluctantly; expressing his opinion, that upon the head of charity the Court had gone too far; and could not interpose in any other case; the personal qualification of the person, appointed the trustee, being so intermixed with the plan of the author of the trust.

In this Will the personal discretion of these two individuals is

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(1) 1 Atk. 469.

(2) *Ante*, vol. vii. 36; i. 464; 3 Bro. C. C. 517.

clearly the object: in ascertaining, first, his nearest relations, secondly, the most deserving. By what means is the Court to determine that; by what rule to give a larger proportion to \* some relations than to the others? In the numerous [\* 35] cases, that have occurred, of dispositions to poor relations, the Court, as they cannot execute the intention, in the terms, by comprehending all, take the Statute of Distributions (1) as the rule; and the natural presumption is, that the nearest relations of the testator deserved well from him. This testator, probably not able to determine, who were his next of kin, gives his property to these two persons, to make the disposition for him; assigning, as his motive, the perfect confidence he has in their integrity, honor and justice; restraining them only to his relations; but, with that single qualification, giving them a discretion, which could not be impeached: a joint discretion, to operate upon the real and personal property, blended together; and there is no inference of an intention to sever them upon the death of the trustees: that the appointment of the real estate should be with the heirs, and of the personal property with the executors or administrators. Who then is to make the appointment? As the testator has given to persons, upon whom the Court cannot fix, it is the same as if he had not made any disposition. In the case of *Harding v. Glyn* (2), the report of which in *Atkins* is not accurate, the executors were justified by the discretion they had in giving to persons, who were not next of kin: but the Court, when the distribution came here, though sanctioning that act of the executors, confined the farther distribution to the next of kin. This case is infinitely stronger, from the necessity of determining, if the Court is to execute this trust, not only who are the nearest, but the most deserving, relations; a determination, to which, though it might be the subject of private, individual, discretion, this \* Court is not equal. The distinction taken in *Harding v. Glyn*, which is according to old authorities, *Carr v. Bedford* (3), *Griffith v. Jones* (4), was adopted by Lord Redesdale in *Mahon v. Savage* (5).

Perhaps, however, it is too much to concede, that these trustees had so extensive a latitude; and that they would not have been compelled by a Decree to distribute among the next of kin of the testator at the time of his death: the only known interpretation of these general expressions in Courts of Law and Equity, following the rule, prescribed by the Legislature. If that is not the limit, there can be none within the utmost extent of consanguinity. It cannot be contended, that, overlooking near relations, they could have taken those more remote. In *Brown v. Higgs* (6) the objects were designed.

(1) Stat. 22 & 23 Ch. II. c. 10.

(2) 1 Atk. 469; see the statement from the Register's Book, *ante*, vol. v. 501, *Brown v. Higgs*.

(3) 2 Rep. in Chan. 77.

(4) 2 Rep. in Chan. 179.

(5) 1 Sch. & Lef. 111.

(6) *Ante*, vol. iv. 708; v. 495; viii. 561.

The case of *Bennet v. Honeywood* (1) appears not to have been much argued.

In *Greenwood v. Greenwood* (2) three distinct *stirpes* were pointed out: the difficulty was therefore more limited. Powers, simply collateral, cannot be assigned; as they may, if coupled with an interest, appendant or appurtenant; in which case the assignee may execute: but there is no precedent for the delegation of such a power as this; admitting no limit or restraint, if the Statute is not taken as the rule. As in the case of *Morice v. The Bishop of Durham* (3), if

[\* 37] this is to be sustained as a trust, it can be sustained only to the extent of the \* Statute; upon the principle of adhering as near as possible to the general intention of benevolence to his relations, particularly his nearest relations. The cases of *Edge v. Salisbury* (4), *Widmore v. Woodroffe* (5), and *The Attorney-General v. Doyley* (6), are authorities for a limited distribution, according to the Statute.

Mr *Alexander*, Mr. *Fonblanque*, and Sir *Thomas Turton*, Mr. *Bell*, and Mr. *Courtenay*, Mr. *Hart*, Mr. *Trower*, Mr. *Toller*, Mr. *Newbolt*, and Mr. *Wingfield*, for the Defendants, relations beyond the limits of the Statute of Distributions, and William and Edward Bray.—The persons, to whom this trust has devolved from the survivor of the trustees, appointed by the testator, are now at liberty to execute it; and may, as those trustees might, go beyond the Statute. The rule, that has prevailed ever since, and before, the case of *Harding v. Glyn* (7), is, that a trust for relations is not treated as a case of intestacy; but is executed by the Court of Chancery as a gift; and from the impossibility of ascertaining all the persons, who may really answer that description, and for convenience, the Court does not go beyond the next of kin according to the Statute. The term “relations” is however of much more extensive import; and, where a particular person is appointed to select proper objects among the relations, means are provided of avoiding the inconvenience, which has imposed upon the Court the necessity of the restriction; and therefore the person, who has such a power of selection, may exercise it in favor of a relation, who does not answer the description

[\* 38] of next of kin according to \* the Statute; yet part of the same property, remaining undisposed of, and the disposition therefore devolving upon the Court, would be divided among the next of kin. The case of *Harding v. Glyn*, as it appears from the Register’s Book (8) is most apposite; and has never been disputed; establishing the rule, that the testator having given another criterion, not open to the imputation of uncertainty, as a general bequest to relations, the intention shall have effect; which certainly fails in some

(1) Amb. 708.

(2) 1 Bro. C. C. 32, n.

(3) *Ante*, vol. ix. 399; x. 522.

(4) Amb. 70.

(5) Amb. 636.

(6) 4 Vin. 485; 2 Eq. Ca. Ab. 194; *ante*, vol. vii. 58, note.

(7) 1 Atk. 469; *ante*, vol. v. 501.

(8) *Ante*, vol. v. 501.

degree, where the execution, devolving upon the Court, has by necessity a more limited operation.

The rule, established by that case, is supported by precedent and subsequent authorities : besides others, which have been mentioned, *Roach v. Hammond* (1), *Jones v. Beale* (2), *Edge v. Salisbury* (3), *Goodinge v. Goodinge* (4), *Brunsdon v. Woolredge* (5), *Isaac v. De-Friez* (6), *Supple v. Lowson* (7), *Whithorne v. Harris* (8), *Green v. Howard* (9), *Rayner v. Mowbray*, (10), *Brown v. Higgs* (11) : where the distinction between trust and power was much discussed. In *Spring v. Biles* (12) the Court of King's Bench took the same course, upon the same ground of necessity ; yet establishing an appointment of part of the property to a relation, who was not next of kin. Lord Redesdale in *Mahon v. Savage* (13) states the rule in the same way. The necessity is obvious : all persons, who can trace their \*connection with the testator, answering the description [\* 39] literally ; and the restriction, adopted for convenience, is similar to that, which is applied in other cases of difficulty ; as where a bequest to children is restrained to those, born, before the eldest attains the period of distribution. In all those cases, however, favoring the restrained construction, there was no discretion to select particular persons : but the distribution was to be among relations generally. The Court, directing the inquiry for the relations, has surmounted the inconvenience of making all the persons, who may claim under the general and comprehensive word "relations," parties.

The material question is, whether these two Defendants, appointed for the purpose by the surviving trustee, have now a discretion to select the objects ; assuming, that, if they have, they may go beyond the Statute. The testator, annexing this power to the estate, devised by him to his trustees, has by clear and unequivocal words given them authority to pass the power with the estate to their several representatives ; and any other construction must strike words out of the Will. There is nothing illegal in the purpose to give such a power to trustees and the survivor, and the executors, and even the assigns, of the survivor. The case of *How v. Whitfield* (14) is an authority, that such a power, given in clear terms, may be delegated. It comes then to a question of intention ; and, the testator having

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(1) Pre. Ch. 401.

(2) 2 Vern. 381.

(3) Amb. 70.

(4) 1 Ves. 231.

(5) Amb. 507.

(6) Amb. 595.

(7) Amb. 729.

(8) 2 Ves. 557.

(9) 1 Bro. C. C. 31.

(10) 3 Bro. C. C. 234.

(11) *Ante*, vol. iv. 708 ; v. 495 ; viii. 561

(12) 1 Term. Rep. 435, n.

(13) Sch. & Le Froy, 111.

(14) 1 Vent. 336, 9.

frequently, though not uniformly, added the words "the heirs, executors and administrators" of the survivor, looking to a period of fifteen years for the execution of the trust, the inference is, that the intention was the same, where those words are not used; and that the trust was to pass to trustees, either by his appointment, [\* 40] or by devolution of \*law. Admitting his great personal confidence in the original trustees, that is a fair reason for entrusting them with the power of delegation, which the terms import. The inconvenience from the possible division of the trust according to the devolution of the different descriptions of property, an event not contemplated by the testator, does not prove, that he had not that intention. The objection, that this is a naked power, is answered by its being coupled with an estate: a beneficial interest not being required; according to the case in *Ventris*.

It is contended, that, if this power can be executed by representatives, they must be the general representatives, according to these general words; but clearly the testator might appoint particular persons to execute this special trust, according to the frequent practice to appoint an executor in a limited way, distinct from the general administration: for instance, one for India, another for England.

The *Solicitor-General* [Sir Samuel Romilly] in reply.—Admitting, that, where a selection is to be made by trustees, they have according to the rule, laid down in *Harding v. Glyn*, a discretion to give to whatever relations they think proper, where it devolves upon the Court, there is no other rule than the Statute of Distributions. The question, whether this is a trust or a power, a point of considerable difficulty, is in this instance of no importance: considered as a power which cannot be executed by the person, to whom it is given, it cannot be executed by this Court; and the effect is an intestacy; as a trust, devolving on the Court, the Statute must give the rule. The only questions therefore are, whether these Defendants, William and Edward Bray, do at this moment \*stand in the place of the trustees, originally appointed: 2dly, Whether they had not renounced it. The former depends in a great measure on the construction of the original testator's Will. The word "*assigns*" is to be found in no part of it except where the interest in the property is given; and there it is used most absurdly. He cannot be taken to use it in the legal sense; the effect of which would be a power to the trustees during their lives to delegate the trust, or part of it, by deed, conveying or assigning part of the property to some persons upon trust to convey or assign to such persons as they think proper: a most absurd intention to attribute from the use of the word "*assigns*" in one place only, where the interest is disposed of, and in no other part of the Will. Having by plain words given the power of selection and distribution to his trustees and executors, he has added a direction, that every thing relative to that disposition shall be in the discretion of his trustees and executors, and the heirs, executors, and administrators, of the survivor of them; and it is only by implication from the passage that it can be contended, that

the power can pass to the representatives. The Court, with the advantage of plain words, will not have recourse to conjecture from that implication. The particular confidence of the testator is not left to conjecture. It is plain from the nature of the trust, expressed in the clearest terms: to ascertain, not only the nearest, but also the most deserving, of his relations. Can he be understood as intending that confidence to pass to persons, perfect strangers to him; and who might be equally strangers to those in whom he reposed confidence; a creditor perhaps: the multitude of persons, who might be the heirs to these lands, which are gavelkind? The period of fifteen years, mentioned for the execution of the trust, is accounted for by the difficulty attending it; of which he was aware: but the declaration, that it must at all \*events be executed [\* 42] within that period, affords no inference, that it was not to be executed during the lives of persons then in being.

If these Defendants had the capacity of executing this trust, they have renounced it. By their own act inducing the Court to take it up they have precluded themselves from executing the material part of the trust: to ascertain, who are the relations; of which the testator made those two persons the sole arbiters; to determine, not by legal evidence, but upon their private knowledge. With regard to that, so material a part of the trust, which is entire, and incapable of being severed, they have desired the Court to ascertain immediately, though fifteen years are allowed by the Will, who are the relations, by the strict rules of legal evidence, in the usual course. The testator seems to have been aware, that such a trust could not be so executed; that there might be many relations, who might not see the advertisements: therefore he was not satisfied with that. This Court, not having the same means of selecting the most deserving and most proper objects, can only take the rule given by Statute.

1807, *Aug. 11th*. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question in this cause arises upon the disposition, made by the Will of Sir Charles Booth, of the residue of his real and personal estate, unto and amongst such of his relations and kindred, in such proportions, manner, and form, as his executors should think proper; recommending and advising them to give the greatest share and proportion thereof unto such person and persons, who in their opinion and judgment should appear to them to be his nearest relations, and the most deserving.

A disposition of this kind contains a mixture of trust [\* 43] and power (1). The trust must be exercised for relations and kindred of some description or other. The power of selection belongs to those, to whom the testator has thought fit to confide it. Whether there is any person now entitled to exercise this power, is the principal question: but a trust exists equally, in whichever way that question may be determined. If there is any person entitled to

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(1) See 2 Ves. 89, *Gower v. Mainwaring*.

exercise that power, the trust will be for those of the relations and kindred, whom such person shall select : if the power is extinct, the trust is for those, who answer the description of relations and kindred according to the construction, this Court may put upon these words. There is no intestacy : nor any resulting trust. The Will makes a complete disposition of all the real, as well as all the personal, estate, upon a trust, to be executed in one or other of the modes I have mentioned. The question is, in which of those modes the trust is to be executed.

The more remote relations, conceiving, that it is only by the exercise of a discretionary power that they can take any part of the residue, contend, that such power is now vested in the Messrs. Bray. Those, who answer the description of next of kin, maintain the negative of that proposition ; contending that the Court must, according to its established rules, now execute the trust exclusively in their favor. That the two original trustees, who were also executors, had a power of selection, is not attempted to be denied : but they are both dead. Wade the survivor of them devised and bequeathed all Sir Charles Booth's estate, real and personal, to the Messrs.

Bray ; and likewise appointed them to be his (Wade's) [\* 44] executors for that special purpose, and not with respect to any part of his own property.

In support of the proposition, that the power passed to the Messrs. Bray, it was contended, that, independently of any more particular indication of intention, a power of this kind to trustees, their heirs, executors, and administrators is not confined to the trustees, originally so nominated ; but passes to all, who may at any time sustain the character. To that position I cannot accede. I conceive, that, wherever a power is of a kind, that indicates a personal confidence, it must *primâ facie*, be understood to be confined to the individual, to whom it is given ; and will not except by express words pass to others, to whom by legal transmission the same character may happen to belong. Of this the case of *Doyley v. The Attorney General* (1) is a strong instance. There, though for the very purpose of sustaining and executing the trusts of the Will the trust had been assigned by the direction of the Court, the power was held not to have passed to the assignee ; though there was no doubt, that he legally sustained the character as completely, as if he had been at first invested with it.

In the case of *Flanders v. Clark* (2) the executors had a discretionary power as to the time of payment. Lord Hardwicke, holding that the surviving executor might execute the power, says, " If that surviving executor had not disposed of it, it would have devolved on " the Court to have done it : " not, that the power would have gone to the executor of the survivor : yet in legal consideration the executor of the survivor was the executor of the testatrix.

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(1) 4 Vin. 485 ; 2 Eq. Ca. b. 194 ; *ante*, vol. vii. 58, n.

(2) 1 Ves. 9.

There is a case in *Moor* (1), in which one of the Judges seems to have thought, that a power, implying personal confidence, would not even by express words pass to executors of an executor. *Weston* says, This is a special trust and confidence, which the testator put in those, to whom he commits the sale: but he could have no trust or confidence in those, whom he did not know; and he could not know, what persons his executors would make their executors.

The other Judges however differed from him upon this; as the power was expressly given to the executors of the executor; though all concurred, that the authority, being joint, was determined by the death of one.

In this case the power not only implies personal confidence; but that is the declared ground, upon which it is given; and therefore, if there was nothing else in the case I should not feel myself entitled to construe this power to belong to any trustees and executors but the two individuals, who were originally so appointed. But it is then said, the testator has in express words given the power, not only to the original trustees, but to the heirs, executors, and administrators, of the survivor of them; and certainly nothing can be more express than the declaration, that every thing, relating to this disposition, as well who are, or are not, to be considered as relations and kindred, and the proportions they shall take, shall be entirely in the discretion of his said trustees, and the heirs, executors, and administrators, of the survivor. Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power, which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorised to strike these words out of the Will upon \*the supposition, though not improbable, that they [\* 46] were introduced in this part by inadvertence and mistake.

I do not apprehend, that a bequest, actually made, or a power given, can be controlled by the reason assigned. The assigned reason may aid in the construction of doubtful words; but cannot warrant the rejection of words, that are clear. What may be the effect of the words is a different question. Of that, it seems evident, the testator had formed no distinct conception.

The original trustees and executors were the same persons. All the real and personal estate is vested equally in them. But the heirs and executors of the surviving trustees might be different persons: yet all the directions about the distribution of the residue proceed upon the supposition, that the same persons are to select the objects, and settle the proportions, in which they are to take.

But, if the real estate is to go to one, and the personal estate to another, he has left it entirely uncertain, how the power is to be executed. It is however said, this difficulty does not exist in the case; as the *Messrs. Bray* unite in themselves the character of heirs and executors of the surviving trustee. The question then is, whether



the description of heirs and executors does belong to them. That they are not the heirs of Wade is admitted: but it is said, the words are to be understood in the same sense as in the limitation of an estate; and import, that the person, taking the trust-estate, shall also exercise the discretionary power. The testator has not said so; and that could not be what he meant. By so limiting the property he put it in the power of the trustee to pass it by devise, or in any other manner, in which real estate could be conveyed: but he could not mean, that whatever would be an alienation of the estate should be a transfer of the power. In the execution of the trust

[\* 47] they might \* have occasion to sell the whole estate: but would the power pass from them; and go to the vendee?

Will it do to qualify the proposition: to say, the power shall pass with the trust? The case of *Doyley v. The Attorney-General* (1) is in direct opposition to that; for the estate, with the trust attached to it, was in the new trustee, appointed by the Court; yet the power was held extinct; though given precisely in the words of this Will. The power is not appendant to the estate: by itself it is incapable of alienation; and it is only *quasi persona designata* that it can go to the heir. The Messrs. Bray do not answer that description. The power therefore is not vested in them. Whether in any sense they can answer the description of executors of Wade, with whose own property they are not to intermeddle, it is not material to determine; for by themselves the executors could not exercise any portion of the power. In the case of *Doyley v. The Attorney-General* it appears by the Register's Book, that Mrs. Turner submitted, "that she, as executrix of Turner, had a right to dispose of Wilson's real and personal estate to the relations of his mother, and in charitable uses:" but no regard was paid to that claim.

Therefore this power of selection and apportionment cannot now be executed; and the residuary estate of Sir Charles Booth is to be considered as devised in trust for the relations and kindred of the testator. It is now settled, that, whatever latitude might be taken by a party, having a discretionary power, the Court executing such a trust, is confined to the next of kin within the Statute of Distributions; any deviation there may have been from that rule in particular cases has depended upon circumstances, that do not

[\* 48] occur in this: and, as the distribution \* of the residue is not suspended by the existence of any preceding estate for life, those, who are to take, are such as answered the description of next of kin at the testator's death (2).

SEE notes 4, 5, 6, 7, to *Brown v. Higgs*, 4 V. 708, as to the parties entitled to distribution of personal property, under circumstances similar to those in question in the present suit, and notes 2, 3, to *Kidney v. Cousmaker*, 1 V. 436, with respect to the right of the heir at law to all real estate, or the produce thereof (when the land has been converted into personalty, either for a particular purpose which fails, or even out and out), if such produce eventually proves to be not well disposed of by his ancestor's will.

(1) 4 Vin. 485; 2 Eq. Ca. Ab. 194; *ante*, vol. vii. 58, n.

(2) See the Appeal as to the real estate: *Waller v. Maunde, post*, vol. xix. 424.

## PEARCE v. CRUTCHFIELD (1).

[1809, FEB. 7.]

UNDER a Settlement on marriage of a female ward of Court, the husband committed and prosecuted, having in consideration of receiving a certain part of her fortune, the value of which was taken by estimation, released all right and interest in the residue, was thereby deprived of all farther interest; and not permitted therefore on suggestion, that the estimation was not fair, to attend the account, directed against the executors (a).

ONE of the Defendants, Mary Pearce, an infant, married, while she was a ward of the Court, the Defendant John Locker. He was committed for the contempt; and was also prosecuted, and convicted, for a conspiracy in procuring the marriage (2). In order to obtain his liberty he consented to settle his wife's property on her, and it was referred to the Master to approve a proper settlement. Before the Master, the accounts in the cause not having been gone through to ascertain the exact fortune, it was taken by estimation at 15,000*l.*; and the Master approved of a settlement; by which Locker was to have 2000*l.* in money; to pay debts, which he alleged he had contracted for his wife; and he released all right and interest in the residue of her fortune; which was settled to her separate use, and to her children, and ultimately at her absolute disposal.

The Bill was filed by Thomas Pearce, an infant, and brother of Mary Locker, against the executors, and \* Mary Locker, and her husband John Locker, and other necessary parties. [\* 49]

A Motion was made by the Defendant John Locker, that he may be allowed to attend the Master in taking the accounts; alleging, that they were so drawn out as not to give the fair result; and that the executors ought to be charged with interest; that his wife's fortune would exceed 15,000*l.*, if the accounts were fairly taken; and that he should be entitled to more than the 2000*l.*, which he had received, if his wife's fortune had been known to exceed 15,000*l.*

The Lord CHANCELLOR [ELDON] said, that by the settlement he had given up for 2000*l.* all right to his wife's fortune, whatever it might be; and that, having no interest in the result of the accounts intended to be passed, it was unnecessary to make an Order for him to attend the Master.

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SEE, *ante*, note, 1 to *Stevens v. Savage*, 1 V. 154, and note 1 to *Stackpole v. Beaumont*, 3 V. 89.

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(1) *Ex relatione*.

(a) As to contempt by the marriage of a ward of the Court, without the consent of the Court, see, *ante*, note (a) *Bathurst v. Murray*, 8 V. 74; *ante*, note (a) *Chas-saing v. Parsonage*, 5 V. 15.

(2) See the note, *ante*, vol. i. 155.

## PEACOCK v. PEACOCK.

[1808, Nov. 16, 17. 1809, MARCH 24; APRIL 27; MAY 1.]

**PARTNERSHIP** without any provision as to its duration may be determined without previous notice; subject to the accounts, to wind up the concern (a).

**Partnership**, without any stipulation as to the proportions: the partners entitled in equal moieties (b).

**Affidavits** admitted on Motion, after Answer, for an Injunction and Receiver in the case of partnership, by analogy to Waste.

**Reasonable notice** a question for the Court or jury, [p. 56.]

**Tenancy at Will** may be determined at any time, as to any new contract: not as to any thing, which during the tenancy remained a common interest, [p. 57.]

A **MOTION** was made by the Plaintiff, that the Defendants Lewis Peacock and Thompson may be restrained from receiving [\* 50] the outstanding debts, belonging \* to the partnership of the Plaintiff and the Defendant Peacock; that a receiver may be appointed; that the Defendant Thompson may be restrained from interfering in the conduct of the business of the said partnership; that both Defendants may be restrained from preventing the Plaintiff returning to the house, where the business was carried on, and preventing or molesting the Plaintiff in conducting it; and for a production of the books, &c.

The Bill represented, that the Defendant Peacock had verbally agreed to take into partnership with him in his business of law-stationer the plaintiff, his son: to be entitled in equal moieties, from the 1st of October, 1803. Disputes arising between them, the Plaintiff was compelled to quit the Defendant's house, where the business was carried on; and the Defendant Peacock afterwards took the Defendant Thomson into partnership with him.

The Defendant Peacock by his answer denied the agreement to admit the Plaintiff into partnership.

Sir *Samuel Romilly*, and Mr. *Leach*, for the Plaintiff: Mr. *Hart*, and Mr. *Heald*, for the Defendant.

1808, Nov. 17. The Lord CHANCELLOR [ELDON].—Under the circumstances of this case it is clear, that this Court cannot prevent the Defendant from forthwith dissolving this partnership. As it is a partner-

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(a) It will be deemed a partnership at will. Story, Partner. § 84, 269; 2 Bell, Com. b. 7, ch. 2, p. 630-634 (5th ed.); 3 Kent, Com. 53 (5th ed.); *Griswold v. Waddington*, 15 Johns. 57; *Heath v. Sanson*, 4 B. & Adolph. 172; *Marquand v. New York Manufact. Co.* 17 Johns. 525; *Miles v. Thomas*, 9 Sim. 606.

(b) In the absence of all precise stipulations between the partners, as to their respective shares in the profits and losses, and in the absence of all other controlling evidence and circumstances, the rule of the common law is, that they are to share equally of both; although the partners have brought unequal amounts of capital into the common stock. Story, Partner. § 24; 3 Kent, Com. 28; *Gould v. Gould*, 6 Wend. 263; *Farrar v. Beswick*, 1 Mood. & Rob. 527. A doubt has been thrown upon this doctrine, as a doctrine of the common law, by Lord Wynford and Lord Brougham; *Thompson v. Williamson*, 7 Bligh, 432; S. C. 5 Wils. & Shaw, 16. See *Harrison v. Sterry*, 5 Cranch, 289.

ship without any agreement for continuance, it may be dissolved at any time; subject to the proper accounts (1). The Plaintiff also cannot make out, that the house has been so thrown into the partnership, that the Defendant cannot consider it his own, and under the circumstances there is no pretence \* for representing [\* 51] it as part of the partnership property.

With regard to the point of practice, as to reading affidavits, this Court has interposed in these cases of partnership upon principles, not the same, but analogous to those, on which it interposes in the case of waste. In that instance, if the fact can be maintained, the objection is pressed with very little effect, that the parties may proceed, vying with each other by affidavits without end. The Court does permit affidavits; taking care to prescribe limits according to the circumstances of each case. In the case of partnership the Court acts upon this principle; that the good faith of the partners is pledged mutually to each other, that the business shall be conducted with their actual, personal, interposition, enabling each to see, that the other is carrying it on for their mutual advantage, and not destroying it. The Court with the view in each case to have sufficient, and no more than sufficient, information, does exercise a discretion in hearing affidavits; to ascertain, what is fit to be done; especially in the case of a partnership, the arrangement and management of which are to continue (2).

With regard to the merits of this case, the facts, whether this partnership is, or is not, beneficial, is not so material, as it has been supposed; the Plaintiff not being able by any agreement, expressed or implied, to make out, that the Defendant was not at liberty, if his moral view of the circumstances led him to it, to put an end to the partnership; and, if he did put an end to it, the Plaintiff, being entitled to an *aliquot* share of profits, can only have an account: but it is impossible to maintain, that the house was ever brought into such a condition, that the Plaintiff can be entitled to carry on the \* trade in that house after the dissolution of the [\* 52] partnership; or to have the house itself considered an item in the joint estate. Taking it to be clear at this moment, that this was a beneficial partnership, the Plaintiff having a title to a certain, definable, *aliquot* part of the profits, could at the hearing have no more than an account of the profits at the period of dissolution; taking care, that what business is now in execution shall be considered as part of the partnership; and that the debts shall be paid. At some period such an account must be taken; and with a view to it the Plaintiff is entitled to an investigation before a jury, in an issue, to ascertain, whether he is entitled, and in what share and amount, to the profits of this partnership.

After the determination of that issue the account will be given

(1) *Featherstonhaugh v. Fenwick*, post, vol. xvii. 298; *Crawshay v. Maule*, 1 Swanst. 495; *Littlewood v. Caldwell*, 11 Pri. 97.

(2) See, post, *Norway v. Reave*, *Murphett v. Jones*, vol. xix. 144, 350, and the note, ante, l. 431.

upon the principle, resulting from the verdict ; or, if the Plaintiff shall appear to have no interest, the Bill will be dismissed : but the Court has no power, considering him as a partner, to introduce him into the Defendant's house.

The Defendant's Counsel asked, whether he could be compelled to try an issue.

The Lord CHANCELLOR [ELDON].—In a case at the Rolls, upon a Bill for an account of partnership transactions, the Defendant denied the partnership, and insisting upon that point (1), which has so much perplexed the Court, refused to set forth the account. Lord

Kenyon would not compel him to set out the account : but [\* 53] said, the Court must, as speedily as \* might be, know the truth of the allegation as to the claim of partnership ; and directed an issue for that purpose. The fact of partnership depends on so many circumstances, that I could not at the hearing refuse an issue, if prayed : but no verdict of a Jury could raise a doubt in my mind upon the Defendant's right to exclude the Plaintiff from his house.

An issue was accordingly directed ; and the verdict established, that the Plaintiff was a partner, entitled to one fourth of the profits. The motion was renewed : the Defendant having, after the verdict, by a notice in writing to the Plaintiff, dated the 11th of March, 1809, reciting the effect of the verdict, declared, that the said partnership is and shall be "dissolved upon this day."

Sir Samuel Romilly and Mr. Leach, in support of the Motion.—Reasonable notice must be given to dissolve a partnership, subsisting for an indefinite period : What notice, must depend upon circumstances : particularly the nature of the business. In a commercial country it is of the utmost importance, that such a question should be determined upon great consideration. The proposition of the Defendant, not supported by any authority, would produce the utmost inconvenience ; that any partner has the power to declare the partnership dissolved ; and at once the dissolution is established ; and they are from that moment tenants in common of all the joint property. Consider the inconvenience, that may to a man, having considerable property, standing out upon security, be the consequence of such a notification, that the concern is from that instant

at an end ; having nothing in the nature of notice ; which [\* 54] \* is necessary, for winding up the concern ; and as it is reasonable, that the party may have an opportunity of inquiring for another concern ; to which he may transfer his capital.

Considering the partnership therefore as still subsisting, the Plaintiff is entitled to interfere, and to refuse the introduction of a stranger ; to whose skill, judgment, and integrity, his interests in his

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(1) See *Rowe v. Teed*, ante, vol. xv. 372. It has been since decided, that this objection cannot be made by answer ; see the notes, ante, vol. xv. 377 ; i. 293, 4.

opinion perhaps cannot with safety be committed. Even supposing the profits of the person, so introduced, are to come out of the Defendant's share, still the Plaintiff may sustain an injury, by the possible consequence in the event of a future dissolution from the opportunity of connection with the customers.

Mr. *Hart* and Mr. *Heald*, for the Defendant.—These parties to this voluntary engagement, not having fixed any limitation of the period of its duration, are not bound beyond the respective will of each. The connection must be dissolved at the instant that either thinks fit so to declare. The law of this country does not raise the obligation of reasonable notice without defining in some way, what it shall be. They had the power of obviating the inconvenience by express stipulation either for continuance or notice: not taking that course, the conclusion is, that they intended the choice of the determination, as of the commencement, of their connection to be mutual. Certainly that arbitrary right to determine will not be allowed to effect injustice with reference to the joint concerns, depending at the determination. For the purpose of winding up those transactions the connection continues (1): but the effect of this notice is to prevent any new joint engagement. The Court will not appoint a Receiver except from the necessity of preventing \* either party from collecting the property, with a [\* 55] view to a future determination.

Sir *Samuel Romilly*, in reply. — The uncertainty of reasonable notice is no objection; and the mercantile law affords several instances; as, what shall be reasonable notice to discharge an indorser: what the reasonable time for presenting a Bill. So, what can be more uncertain than the right of the Lord of a Manor to a reasonable fine? The notice is capable of being reduced to certainty by the custom of the particular trade; which governs the contracts entered into. It is as important to a trader quitting a business of this nature, as to a tenant, quitting a farm, to have time to look round; and inquire, how he may employ the capital, thrown upon his hands. If a partnership can be so determined, it is singular, that no instance is produced. The inconvenience and injustice may be enormous. Suppose a quantity of raw material, bought for the purpose of being manufactured: could either partner throw upon the other the loss, which must arise from selling that Stock in its original state? Upon such a dissolution of partnership in the trade of a wine-merchant, while cargoes were at sea, could a sale upon the credit of that house, according to the usual course of their business, be thus prevented?

*March 29th.* The Lord CHANCELLOR [ELDON]. — The difficulty, which struck me, when this motion was originally made, and which still continues, is of this nature. The father employed his son in his

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(1) *Featherstonhaugh v. Fenwick*, post, vol. xvii. 298; *Crawshaw v. Maule*, 1 Swanst. 495.

business; and, as is frequently done by a father, meaning to introduce his son, the business was carried on in the name of [\* 56] "Peacock and Co." It appeared to me, that the son, insisting, that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that, as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners if partners in any thing. In that view the result of the issue, that was directed, appears to be extraordinary. The proposition being, that the son was interested in some share, not exceeding a moiety, the Jury in some way upon the footing of *quantum meruit* held him entitled to a quarter. I have no conception, how that principle can be applied to a partnership. The parties however consider themselves bound by that verdict.

With regard to what has passed since, the question was much agitated at the bar, whether this partnership is now dissolved by the notice in writing from the Defendant, that from and after the date of that notice the partnership should be considered dissolved. The Plaintiff insists, that it is not dissolved; and that it can be dissolved only upon reasonable notice. I have always taken the rule to be, that in the case of a partnership, not existing as to its duration by contract between the parties, either party has the power of determining it, when he may think proper; subject to a qualification, that I shall mention. There is, it is true, inconvenience in this: but what would be more convenient? In the case of a partnership, expiring by effluxion of time, the parties may by previous arrangement provide against the consequences: but where the partnership is to endure so long as both partners shall live, all the inconvenience from a sudden determination occurs in that instance as much as in the other case. I cannot agree that reasonable notice is a subject too thin for a Jury to act upon: as in many cases Juries and Courts do determine, what is reasonable notice. With regard to the determination of contracts upon the holding of lands, when tenancy at \* will was more known, than it is now, the relation might be determined at any time: not as to those

[\* 57] matters, which during the tenancy remained a common interest between the parties: but as to any new contract the Will might be instantly determined. When that interest was converted into the tenancy from year to year, the law fixed one positive rule for six months' notice: a rule, that may in many cases be very convenient: in others, that of nursery grounds, for instance, most inconvenient. As to trades, in general, there is no rule for the determination of partnership; and I never heard of any rule with regard to different branches of trade; and, supposing a rule for three months' notice, that time might in one case be very large; and in another, in the very same trade, unreasonably short.

I have therefore always understood the rule to be, that in the absence of express contract the partnership may be determined, when either party thinks proper; but not in this sense; that there is an end of the whole concern. All the subsisting engagements must be

wound up: for that purpose they remain with a joint interest: but they cannot enter into new engagements (a). This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some different doctrine might have fallen from the Court at Guildhall: but upon inquiry from the Lord Chief Justice as to his conception of the rule, I have no reason to believe, that if this notice had been given before the trial, the Jury would not have been directed to find, that the partnership was by the delivery of that paper dissolved. My opinion however being such as I have stated I can do no more in this unhappy case than restrain each party from receiving the effects of that partnership, determined at the date of that paper, and appoint a Receiver of the \* outstanding estate (1). This has so entirely altered the [\* 58] views of both the parties, that it is better that any farther proposition should be the subject of another motion.

*April 15th.* After the appointment of a Receiver a motion was made by the Plaintiff that the Receiver may be ordered to sell the stock, and the lease of the house, and to pay the Plaintiff a certain sum of money.

For the Plaintiff it was insisted, that one partner cannot under the pretext of dissolving the partnership turn out the other; depriving him of his interest in the good-will; that the house, in which the trade was carried on, though used by the Defendant Peacock as a dwelling house also, and the lease being in his name only, is partnership property: and, the lower part only being used as a shop, is capable of apportionment: and, if the application for a sum of money, to enable the Plaintiff to prosecute some business for himself, which was admitted to be new, should be resisted, at least the Defendant should be required to make an affidavit, that he believes nothing is due to the Plaintiff.

The motion was opposed: the Defendant contending, that though he had appropriated part of his house to the purpose of carrying on the business, he never intended to make it partnership property.

At length a compromise, which had been strongly recommended by the Lord Chancellor, took place.

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1. As to the strong case which must be made out before a court of equity will allow affidavits filed after an answer has come in, to be read in support of a motion for an injunction in a case of partnership, see *Lawson v. Morgan*, 1 Price, 303; and even affidavits filed by a plaintiff before the defendant has answered, can only be received as to the facts of exclusion or mismanagement, not as affecting matter of title: *Norway v. Rowe*, 19 Ves. 157; see, *ante*, note 2 to *Isaac v. Humpage*, 1 V. 427; note 2 to *Master v. Kirton*, 3 V. 74; and the note to *Hartz v. Schrader*, 8 V. 317.

2. With respect to the cases in which a defendant may, though he makes defence by answer, refuse to give any answer concerning the account which is the substantial object of the suit brought against him, but the right to which depends

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(a) Story, Partnership, § 322, 324; *Murray v. Mumford*, 6 Cowen, 441.

(1) *Milbank v. Revett*, 2 Mer. 405; 1 Swanst. 480, 1.



upon a previous act which the answer positively denies, see note 1 to *The Marquis of Donegal v. Stewart*, 3 V. 446.

B. That a contract for a partnership of indefinite continuance may be terminated whenever any of the parties thinks fit, see note 2 to *Crawshaw v. Collins*, 15 Ves. 218.

[\* 59]

## LLOYD v. PASSINGHAM.

[1809, FEB. 11, 21, 28; MARCH 28, 29; APRIL 18.]

A RECEIVER may be appointed against the legal title in a strong case of fraud upon affidavits: but under the circumstances of this case, an application, after answer, for that purpose, an Injunction against committing waste and disposing of the estate was refused.

Forgery not conclusive against a fact, proved by other evidence.

The Fleet Register evidence, not as a Register, but a declaration upon the fact.

Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself, no inference to the truth of the fact (a).

By the Canon Law the Clergy are required weekly to form and sign the Registers, and annually to transmit a duplicate to the Ordinary. That duplicate is evidence, [p. 63.]

A MOTION was made by the Plaintiffs for the appointment of a Receiver, and for an Injunction against cutting timber, and committing any other waste; and from selling and disposing of the estates, or any part thereof; and from proceeding against the Plaintiffs under the covenants in the indentures, in the pleadings mentioned. The following circumstances appeared by the Bill and Answers.

In the year 1740 Elizabeth Taylor cohabited with Gwynne Lloyd; and during that connection, in 1741, a child was born; who was the legitimate mother of the Defendants, Robert and Jonathan Passingham. In 1742 Elizabeth Taylor died. In 1746 Gwynne Lloyd married. In 1794 a suit was instituted in the Court of Chancery; and an ejectment was brought on the demise of Robert and Jonathan Passingham; which was tried before Mr. Justice Heath; and a verdict was found for the Plaintiffs. That led to a compromise; under which the Passingshams were in possession.

The Bill upon which this suit was instituted, impeached that verdict; as obtained by evidence, which ought not to have been received: 1st, the register of a marriage at the Fleet between Gwinne Lloyd and Elizabeth Taylor: 2dly, copies of entries in the Register

(a) It has been said, that if a witness declines to answer, his refusal may well be urged against his credit with the jury. 1 Stark. Ev. 177; *Rose v. Blakemore*, Ry. & M. 382, per Brougham, *arg.* But, in several cases, this inference has been repudiated by the Court; for it is the duty of the Court, as well as the object of the rule, to protect the witness from disgrace, even in the opinion of the jury and other persons present; and there would be an end of this protection, if a demurrer to the question were to be taken as an admission of the fact inquired into. 1 Greenl. Ev. § 460; *Rex v. Watson*, 2 Stark. R. 158.

of the parish of Pancras, of the burial of the mother, and the birth of the daughter ; which were represented as forgeries, effected \* by the contrivance of Robert Passingham ; and in support of the motion upon that ground affidavits were offered of the persons, who were concerned in that transaction under his immediate direction. He put in a Demurrer to so much of the Bill as sought a Discovery of those facts. [\* 60]

Mr. *Richards* and Mr. *William Agar*, in support of the Motion.—There are several instances of the appointment of a Receiver upon a legal title, upon a strong ground of fraud : *Mordaunt v. Hooper* (1), *Andrews v. Powys* (2), *Vann v. Barnett* (3), *Robinson v. Robinson* (4). The principle is, that, where a serious judicial doubt is established, whether the Defendant, in possession, is not a trustee for the Plaintiff, this Court will take measures, that in the event of the Plaintiff's success will ensure to him his property. These Plaintiffs under the circumstances, disclosed by the affidavits, a verdict, obtained through such means, by copies of forged registers, ought to have the opportunity of laying the case before another Jury.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Benyon*, and Mr. *Wingfield*, for the Defendants.—This application for a Receiver is perfectly new. A Court of Equity will not in any instance by this summary course, upon affidavits, without a legal trial, and the intervention \* of a Jury, take the possession from a party, who [\* 61] has it under a legal title ; which has continued for several years ; leaving him to abide the event of a long Chancery suit : but if such a jurisdiction can ever be assumed, it will not in this instance, upon the affidavits of such witnesses as these appear to be, by their own statement. It would lead to the most important and dangerous consequences. At the distance of fourteen years from the time, when the verdict was obtained, evidence is produced, that some of these entries are forged : evidence of witnesses, avowing, that they committed the act, and suppressed it, for money. In the case of *Vann v. Barnett* (5) the Receiver was appointed upon something, which appeared in the affidavit of the Defendant himself ; and the observation has been frequently made, that if he had remained silent, it could not have been done. This verdict was obtained chiefly upon the Fleet Registers. Mr. Justice Heath, observing, that the case turned entirely upon the credit the Jury gave to those Registers, received them ; and stated cases, showing, that they are at least evidence to go to the Jury : as, in a case of bigamy, to support or contradict the party's declaration, that he was married in the Fleet. This case has that, which is required as the foundation of such evidence : the declaration of the party to one of the witnesses, that he

(1) Amb. 311.

(2) 2 Bro. P. C. 476.

(3) 2 Bro. C. C. 158 ; ante, *Jervis v. White*, vol. vi. 738, and the note, 739 ; *Huguenin v. Baseley*, xiii. 105.

(4) 19th June, 1799. In Chancery.

(5) 2 Bro. C. C. 158.

was married in the Fleet; which is confirmed by the entry in the Register produced. These Registers were received by Lord Hardwicke; and were rejected by Lord Kenyon. Admitting the charge of forgery as to the other Registers, there is sufficient to support the verdict.

Mr. *Richards*, in reply, insisted upon the jurisdiction to appoint a Receiver in a case of fraud; and upon that ground it was done in *Vann v. Barnett*: the Court seeing, that the possession [\* 62] \* had been obtained by a fraud: the Plaintiff being prevailed upon to execute the conveyances under the supposition, that he was indebted: the Bill asserting, that nothing was due: that assertion established by affidavits; whether confirmed by any thing in the affidavit of the Defendant is immaterial to the question of jurisdiction; and ultimately a debt appeared to be due to the Defendant.

The Lord CHANCELLOR [ELDON].—Much as I have been pressed to refuse this evidence, my opinion is, that it may be received in this stage of the cause. This is great difficulty in the way of that part of the motion, which seeks to restrain the party from selling the estate. That is done in very few cases: never, unless an intention to sell for the purpose of embarrassing the title is proved. There is nothing in the answer of Jonathan Passingham, that does not correspond with his admitted character. If he could be produced, as a witness, to prove what he swears as a Defendant, stating, that he believed himself to be the son of the legitimate daughter of Gwynne Lloyd, he would be a very material witness to Robert's legitimacy.

The evidence, produced at the trial, was of three sorts: 1st, the Fleet Books; alleged to have been kept so regularly, that they might be admitted in evidence; and they were admitted: the original Books being produced: not copies, as of the Pancras Registers: 2dly, evidence of reputation; which is more or less strong, as it is more or less contradicted; and it is extraordinary, that in this case there was very little, if any, contradiction to the evidence of reputation; which is strong in one respect, as fixing the fact, that there was a marriage in the Fleet: 3dly, these Parish Registers. With reference to the last head I do not go the length, required [\* 63] by the \* Plaintiff. The effect of the other evidence, though considerably affected is not destroyed by the fact of this forgery. The Jury should not be induced by their indignation at that fact to refuse a verdict, due in conscience to the other evidence. I give no opinion, that the Fleet Register is evidence, as a register; but I am not prepared to say, it may not be received as evidence of a fact; and I can suppose cases, in which such evidence might be received. Upon a question of pedigree would not that entry be admitted, not as a register, but a declaration under the hand of the party: or upon an indictment for bigamy, the first marriage alleged to have been in the Fleet, and evidence produced, that uniformly an entry of marriage was made: would not the pro-

duction or non-existence of such entry be evidence to the other fact?

With respect to the Pancras Register, now produced, it appears to be compiled, and a copy from some other book: the Vicar's name at the bottom of several pages being evidently not his own writing. None of these registers have been kept until lately according to Law. By the Canon Law the Clergy are required every week to form and sign these registers, and to send annually a duplicate to the Ordinary; which duplicate, being by the Law required to remain with him, would itself be evidence. That was never done; and in the *Chandos Case*, in the House of Lords, one noble Lord, now deceased, was disposed on that ground to reject a great number of registers; as not having been kept according to the Canon. The House however thought, that the subject, having fallen into so loose a state, could not in that instance be taken with such strictness. From what passed in that case there is now considerable security for the authenticity of evidence of pedigree in future; as, partly upon my suggestion, the Bishops came to a determination \* to require the transmission of these du- [\* 64] plicates; and this case is a strong instance of the absolute necessity, that this provision of the Canon Law should be observed.

The evidence being thus constituted, the admission of the Fleet Books was much disputed. That evidence, it was known, had been much reprobated by Lord Kenyon; not only when rejected by him; but also on another occasion, about the same time, when it was received by another Judge. Yet, though that was a familiar subject in Westminster Hall, these parties instead of applying for a new trial, or any inquiry about these registers, make this arrangement for a compromise: a circumstance, raising an inference in favor of the claim.

I protest strongly against the doctrine, that Robert Passingham, having demurred to so much of the Bill as seeks a discovery of facts, which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the Bill; having observed a notion prevailing lately, that a witness, who refuses to answer a question upon that ground, is therefore not to be believed. Nothing can be more fallacious, as a standard of credit, than such a conclusion; or more dangerous to Justice by depriving the subject of that protection, to which he is entitled by Law; and the practice formerly was, that the Judge told the witness, he was not bound to answer the question.

With regard to the application for a receiver, Lord Kenyon, in the case of *Vann v. Barnett* (1), said, he could not have granted that Motion upon the affidavits, produced in support of it: but, the Defendant having been imprudent enough to make an affidavit in answer, the \* Court proceeded on that; and I [\* 65]

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(1) 2 Bro. C. C. 158.

can conceive a case, in which the Court may so proceed. Suppose an agreement for a mortgage, by an absolute conveyance, with covenant for redemption by a collateral instrument: the mortgagee being at the time tenant in possession; and, having obtained the conveyance, he refused to execute the defeasance; and that, besides holding the possession, it was proved farther, that he meant to cut timber: can it be maintained, that, as he could not, before the cause could be heard, be reduced to a mortgagee on parchment, this Court could not upon proof of such a fraud interpose by granting a Receiver? The fraud must rise so high as almost to compel the Court to do what is, I admit, a very strong act. Suppose, for instance, it was distinctly proved, that the Fleet Register was a forgery; and all the witnesses had been convicted of perjury in that very article. The Court must never lose sight of the distinction, that they are to act upon the evidence of the fact; not upon the refusal of the party to answer.

*April 18th.* The Lord CHANCELLOR [ELDON].—This is a motion of very great importance. As that part of the estate, which Robert Passingham took, does not remain vested in him, the question will be with other parties; who are not before the Court; and who may have a case against the equity prayed, which he could not have. The motion must therefore be considered as going to a part only of the property. I give no opinion upon the application for an Injunction against committing waste; not finding more on this record than that during the time Jonathan Passingham considered himself fairly entitled to the ownership, he cut timber: not that, since this controversy upon the title arose, he has either cut, or threatened. [\*66] Neither can I find a ground for interfering at present to prevent the Defendants from selling or disposing of the estate. No such purpose appears upon the Record; and the suit itself would operate as to purchasers. No ground therefore is laid for such interposition.

The real question is, whether under the present circumstances of this title I ought to appoint a Receiver. The course, which the question upon the title of these Defendants took, was an ejectment, on the demise of both of them; which, I should think, ought to have been upon the demise of the elder only. Upon the trial of that ejectment three species of evidence were offered: the first, composed of the testimony of several witnesses; to prove the fact, that the book, produced as the Fleet Register, was really such; and, when that fact, which was left very distinctly, as a point for the consideration of the Jury, was made out to their satisfaction, very little argument seems to have passed at the trial upon the point, whether that book, proved to be a genuine and authentic document, was, or was not, admissible evidence. Proof was given, that this book had been frequently produced as evidence in other trials; and Mr. Justice Heath, who seems to doubt, whether it ought to be proved, expresses that fact, that he had known those books often produced; and the book

was admitted. I do not enter into the consideration, whether it was properly admitted, or not : if properly, there is no reason to complain of it : if improperly, that was a point for the consideration of the parties, when determining, whether they would compromise the question of title, and upon what terms. The circumstance, that Gwynne Lloyd on his marriage with Miss Hill, in 1746, swore himself to be a bachelor, though material, is open to observation from the known conduct of men. \* That circumstance [\*67] does not appear from the notes of the trial, which are before me, as part of the affidavit, to have been before the Jury.

The Fleet Register contains an entry of the marriage of persons of these names : and with regard to that register an attempt was made to induce me to think, not that I ought to shut my eyes to the contents of that book, as not to be admitted in evidence, but that, having it before me, I should consider that entry a forgery : that, not the book itself, but this particular part of it, is an unauthentic document ; and that this is not to be considered as part of that book. I have nothing before me, that will justify an opinion, formed on that ground, that this entry is a forgery : an inference, too strong, even if I was perfectly satisfied that the Pancras Register is a forgery : especially as the second head of evidence, reputation, is extremely material. I agree with Mr. Justice Heath, that the evidence of reputation is rather scanty : but that observation might have been followed up by another ; that the consideration was not merely, how much or little evidence of reputation was produced by the Plaintiff, but farther, that no evidence was offered by the Defendants in that cause ; and they stood in a relation, which peculiarly enabled them to give all the evidence of reputation, that could be given in such a family cause.

The third head of evidence, the register in the parish of Pancras, is extremely material in every point of view. I apprehend, that, if I had tried that cause, I should have stated that to be very strong, and comparatively better evidence, and of a higher character, than the Fleet Register can in any view be considered ; as, if there was evidence of reputation from the family, consisting of declarations by Lloyd himself, referring to a marriage in the Fleet, supported \* by evidence from an authentic Register, that, [\*68] which the law undoubtedly admits to be an authentic source of testimony, attributing to these persons the characters of wife and-child, that species of testimony altogether would have made a very strong case, deserving at least as strong an observation as was applied by Mr. Justice Heath to the Fleet Register ; that the whole cause nearly depended upon it ; certainly calling in aid from the Pancras Register.

These registers being produced, the Jury thought, the legitimacy of the daughter of Elizabeth Taylor, depending upon her marriage with Lloyd, was proved to their satisfaction ; and the consequence followed, that, the mother of these Defendants being his heiress at law, the eldest of them, as the heir at law, was entitled to recover in

the ejectment; and the verdict was given accordingly. The parties then thought proper not to enter into the question, whether the Fleet Register should have been admitted; or whether any evidence of reputation could be produced, to beat down the evidence given upon the trial; not entering into the consideration whether they should, or should not, investigate the original books, at Pancras, from which these copies were produced: a circumstance not to be pressed against them, as deserving blame. Giving up however the considerations as to the Fleet Register, and how far they could meet the evidence of reputation by evidence of the same nature, and misled, if you please so to put it, by what happened with regard to the Pancras Register, they enter into a compromise.

The equity of this Bill is, that it now appears by discovery, lately made, that the Registries in the Parish of Pancras are forgeries; and the verdict was therefore obtained by fraud; and must [\* 69] have been the other way if \* the fact had been understood: that the compromise is therefore founded in a fraud, practiced by Robert Passingham, not imputed to Jonathan: nor upon his answer can it fairly be imputed to him: but the principle of equity, affecting him, is, that a mere volunteer, obtaining a title, gained by fraud, shall not have the advantage of it against those, who have the better right; and that it is against conscience, that he, who has given nothing for the property, which he has obtained by the fraud of another, shall hold it. His answer amounts to no more than this; that it does not contain an admission of the truth of the Bill. With regard to the answer of the other Defendant, he, being charged as a party in these imputed forgeries, demurs to so much of the Bill as seeks a discovery of his participation in them; and it is contended, that, as he has so demurred, this Court may therefore assume that the forgeries existed. Upon that point, if in any other place it is to be so taken, I cannot in a Court of Justice hold, that, a party demurring to answer a criminal charge, that is to be taken as an admission; and it would be most extravagant, that his conduct in that respect should be taken as a ground for dealing with the property of a third person, as if it had been already brought into doubt. I cannot take that conduct to furnish this principle even against Jonathan Passingham.

Upon the question, now to be determined, the first consideration is, whether affidavits can be read. The case of *Huguenin v. Baseley* (1) appears rather as a compromise than an authority; but my opinion is, that cases of fraud, combined with danger to the property, may arise, as to which a Court of Equity may interfere on affidavits, notwithstanding the objection to that course. The [\* 70] \* Court interposes by appointing a Receiver against the legal title, with reluctance; compelled by judicial necessity, the effect of fraud, clearly proved, and imminent danger, if the intermediate possession should not be taken under the care of the

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(1) *Ante*, vol. xiii. 105.

Court. Suppose an agreement for the mortgage of an estate, comprehending an advowson, that advowson, especially with reference to an approaching presentation, forming nine tenths of the value; that the parties, instead of the ordinary mode, by one set of indentures of lease and releafe, took the course of an absolute conveyance, with a defeasance, and the one, having advanced his money, and taken that absolute conveyance refused to execute the defeasance; and then upon an avoidance presented his Clerk to the Bishop; would not this Court in such a case, upon the simple question, whether he agreed to execute the defeasance, and the whole equity depending upon that, interpose; until the nature of the transaction should be understood: or permit the property to be destroyed to the extent, which the institution upon that presentation would produce? I should not hesitate to make a precedent in such a case: but for that purpose the Court must not only be morally sure, that at the hearing the party would upon those circumstances be turned out of possession, but must see some danger to the intermediate rents and profits from not acting rather prematurely. In the great Douglas Cause many forgeries of Registers were produced; and the effect of that production upon the rest of the evidence, which was genuine, was the subject of much discussion and great doubt. The same difficulty occurred in Lord *Valentia's* Case; which is noticed (1) by Lord Erskine in *Vowles v. Young* (1).

The allegation of this Bill is, that if the question of legitimacy should be again laid before a Jury, it is highly probable, that, \*as these Registers are forged, the result will be, that [\* 71] the Defendants are illegitimate; in considering which I must attend, not only to the danger as to the intermediate possession, but also to the possible effect, if, having deprived them of the benefit of their contract, the other parties should fail in establishing their allegation. Upon the point whether this is or is not a forgery, the evidence now before me requires much explanation: and a great part of these affidavits has not the character of testimony; and deserves no attention. Besides contradiction as to time, and other observations upon the material evidence of Young, the Parish Clerk, as to these Registers, the conclusion upon these affidavits is, that Kendry had gone into the church with him, had erased by pumice stone and India rubber, those articles being left upon the altar, some entry in the book, and inserted an entry of the burial of Elizabeth Lloyd and the birth of the daughter; Robert Passingham standing outside: but upon inspection it is impossible not to see, that the operation must have been of a different description from that, which these affidavits directly import; as no less than three pages of the book must have been obliterated; the names collected on a separate paper; and those three pages must have been written over; with the alterations, by inserting the name of the mother in one page, and that of the child in another, with the regular dates. The question

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(1) *Ante*, vol. xiii. 140; see 145.



is, whether, taking into consideration all the circumstances of this case, the trial not having proceeded upon the evidence of these books only, no danger being suggested as to the intermediate rents of that part of the property, which is in the possession of Jonathan Passingham, and the possession being held under a bargain between them, I should be justified in changing the possession. Whatever may be the ultimate event of this suit, to which my act this day, refusing this application, will be no prejudice, I do not conceive, [\* 72] that these circumstances \* form that extreme case, in which the possession is to be taken from those, who have the legal title (1).

1. ALTHOUGH the fact of a marriage is now most regularly proved by the register in which the solemnization of the ceremony has been duly entered, according to the provisions of the statute of 26 Geo. II., c. 33, still, it has been repeatedly held, the Marriage Act has not done away with the ancient mode of proving a marriage by presumptive evidence in all civil cases, except actions for criminal conversation: *St. Deveraux Parish v. Much Dew Church*, 1 W. Bla. 367; *Hervey v. Hervey*, 2 W. Bla. 879; *Morris v. Miller*, 4 Burr. 2058; *Burt v. Barlow*, 1 Dougl. 174; *Read v. Passer*, Peake's N. P. C. 233; *S. C.*, 1 Espin. N. P. C. 214; *Leader v. Barry*, 1 Espin. 354; *Faremouth v. Watson*, 1 Phillim. 357.

2. The effect of testimony which, if it stood alone, would be conclusive, may be materially weakened when an attempt is made (unwisely as well as criminally) to corroborate the same, by gratuitous falsehood or forgery; but it does not therefore follow, that the whole of the testimony is, in every case, to be absolutely rejected: see the concluding part of note 3 to *Voules v. Young*, 9 V. 172; see, also, the earlier part of the same note as to the evidence admissible upon questions of pedigree.

3. Certificates of Fleet marriages are never received as evidence: *Nokes v. Milward*, 2 Addams, 391. And though the original registers of the Fleet have occasionally been admitted in evidence (*Doe v. Madox*, 1 Esp. N. P. C. 197), yet this practice has not been approved: *Read v. Passer*, 1 Esp. N. P. C. 213. Lord Eldon, it is true, has observed, that since courts are in the habit of admitting registers, and even copies of registers of the established church, which have not been kept according to the canon, that is (his lordship added), not according to law, it was difficult to say why the fleet registers are rejected: *Walker v. Wingfield*, 18 Ves. 444. But it is impossible to mistake his lordship's meaning, which plainly was, not that the fleet registers should be received, but that irregular church registers, and *a fortiori* the copies of such registers, should be rejected. When this cause came on in a subsequent stage (as reported in Coop. 155), Lord Eldon again expressed his opinion, that the book of Fleet marriages could not be read as a register. It is only in cases where the registers of our own established ecclesiastical jurisdictions are in question, that copies of such documents are ever admitted in evidence: *Auriol v. Smith*, 18 Ves. 204. A copy of a register kept in the Island of Guernsey will not be received (*Huet v. Le Mesurier*, 1 Cox, 275); nor the copy of the register of any foreign chapel (*Leader v. Barry*, 1 Espin. 353); still less ground would there be for receiving a certificate of a Greta-Green marriage as a proof of such marriage (*Nokes v. Milward*, 2 Addams, 391); for a certificate must always be of less credit than a copy compared with the original, and proved on oath: *Dunbar v. Harvie*, 2 Bligh, 378. And an examined copy of a register of a dissenting congregation is not evidence, though, if the books themselves are produced at the hearing of the cause, they may possibly, in some cases, be made evidence to a certain extent: *Ex parte Taylor*, 1 Jack. & Walk. 483; *Newham v. Raithby*, 1 Phillim. 315; *Lawrence v. Dixon*, 1 Peake's N. P. C. 136.

4. It is only for the purpose of arguing a demurrer put in, that the charges well pleaded by the bill demurred to are, *quod hoc*, to be taken as true; it is not to be

(1) 3 Mer. 697. The Bill was afterwards dismissed: Coop. 152.

understood that the party who resorts to this mode of defence confesses the allegations made against him to be really true: see note 3 to *Ford v. Peering*, 1 V. 72.

5. What constitutes a *lis pendens*, so as to affect a purchaser of the subject in dispute, is discussed in note 2 to *The Bishop of Winchester v. Beavor*, 3 V. 314.

6. As to the grounds upon which a receiver may be appointed upon an *ex parte* application by affidavit, even before a *subpoena* has been served, see note 3 to *Jervis v. White*, 6 V. 738.

7. On the 29th of July, 1811, a motion was made in this cause (as reported in 3 Meriv. 697), for a receiver, against the legal estate; the motion, being grounded upon the assumed effect of evidence taken in the cause which had not been heard, was at once refused. And on the 21st of February, 1815, (as reported in Coop. 152,) a bill to set aside a compromise entered into between the parties in the present suit was dismissed. The question has, however, again been tried at law, (at the Shrewsbury Summer Assizes in the year 1826,) and a verdict in ejectment recovered against the title of the Passinghams.

## WILLAN v. WILLAN.

[1809, APRIL 21, 26; 1810, APRIL 23.]

**AGREEMENT** decreed to be delivered up on the ground, not of fraud, but surprise: neither party understanding the effect of it (a): namely, a lease, with covenant for perpetual renewal, at a fixed rent, of premises, held under a church lease, renewable upon fines, continually increasing.

A single lease for twenty-one years refused: no terms of agreement for such an interest appearing; and under the circumstances permission to try the effect of it at law was refused.

Petition for leave to file a Bill of Review, after a Decree, affirmed on re-hearing, and pending an Appeal to the House of Lords, for the purpose of introducing evidence in answer to evidence, admitted by surprise, namely, not in answer to an interrogatory, nor the subject directly in issue, the Decree not being made upon that evidence, was refused with Costs.

Distinction between carrying an agreement into execution and disturbing it, when executed: also as to decreeing it to be delivered up, or leaving the party to make the most of it at Law (b), [p. 83.]

Covenant for perpetual renewal valid, [p. 84.]

Where a Court of Equity, refusing to execute an agreement, leaves the parties to Law, [p. 86.]

Execution of a Decree not stayed by an Appeal without a special Order (c), [p. 89.]

THE Bill in this cause was filed by William Willan, great nephew and devisee for life, and by his infant son, devisee in remainder, under the Will of John Willan, devising his freehold estates to the Plaintiff for life, and to his first and other sons in tail male, in the usual course of strict settlement; with a limitation in failure of is-

(a) As to the meaning of the word *surprise*, as used by Courts of Equity, see 1 Story, Eq. Jur. § 120, note, 134. Jeremy seems to suppose there is something technical in its meaning. Jeremy, Eq. Jur. 366; Eden, Injunct. (2d Am. ed.) 21, 27, notes.

Mutual misapprehension of rights, as well as of the effect of agreements, may properly furnish, in some cases, a ground for relief. 1 Story, Eq. Jur. § 123, 134; see, *ante*, note (a) *Townshend v. Stangroom*, 6 V. 328.

(b) See, *ante*, note (d) *Mortlock v. Buller*, 10 V. 292.

(c) See, *ante*, notes (a) and (b) *Gwynn v. Lethbridge*, 14 V. 587.

sue male of William Willan to the first and other sons of the Defendant John Willan, nephew of the testator; with a direction for accumulation during his life; and with remainders over; and limiting the copyhold and leasehold estates upon such trusts as would best correspond with the uses and powers directed as to the freehold estates; or as near thereto as could be. The Bill prayed, that an Agreement, dated the 6th of August, 1792, may be declared to have been unduly obtained from the testator; and may be set aside; and that a lease executed, in pursuance of that agreement, by [\* 73] the \*devisees in trust, may be declared to have been executed by mistake; and may be delivered up by the Defendant John Willan; or that he may be declared a trustee for the Plaintiff; and may re-assign to the other Defendants; and deliver possession; and account, &c.; and, if the Court shall be of opinion, that the lease ought not to be set aside *in toto*, that the stipulation for a perpetual renewal may be declared unreasonable, and to have been a surprise and imposition upon the testator, obtained without consideration; and ought to have no effect.

The premises in question were the leasehold manor and farm of Brownswood at Hornsey, held by the testator of the Prebendary of St. Paul's Cathedral, under a lease, renewable every seven years on payment of a fine at the will of the lessor. The testator died at the age of eighty-two on the 11th of August, 1792. The agreement was executed on the 6th of that month; while the testator was confined to his bed by the illness, of which he died; stating, that the lease, which the Defendant then had of his uncle of part of the premises at Hornsey, should be cancelled; and a new lease of twenty-one years renewable every seven years for ever, or so long as the testator or his assigns hold from the Prebendary of St. Paul's, should be granted of the farm the Defendant then held, and two others, at the yearly rent of 565*l.* clear of taxes, to commence at Michaelmas, 1794; and that it was farther agreed, that if any fines should be demanded on account of an increase of buildings on any of the above farms, the Defendant should pay those fines.

This paper was signed by both parties; and was witnessed by Dr. Kirkland, the physician, and Colborne, the apothecary, then attending the testator. A lease was [\* 74] \*accordingly executed by the trustees, dated the first of September, 1795, for fifteen years, at the yearly rent of 565*l.*: with a declaration, that upon surrender of that lease a new lease for a farther term of twenty-one years, or such other term as the trustees should be enabled to grant, should be granted to the defendant, his executors, &c.; and so *toties quoties* for ever, or so long as the executors, &c. of the testator should hold the premises under the Prebendary.

The Bill stated, that the fines are considerably raised upon every renewal of the original lease; and, if the agreement should prevail, the devise will, from the increase of the fine upon renewal, to be paid out of the testator's estate, become of no value; as the fine and interest will amount in seven years to the whole rent; though

the land is now worth at least 1200*l.* per annum ; and charged, that the agreement was improperly obtained by the influence of Joseph Baines ; that the testator was incapable of understanding the nature of the agreement, when he signed it ; that he never intended to renew, or grant, such a lease to the Defendant ; that, though his attorney was in the house, he was not called upon to attest it ; and the testator was not apprised of it, until called on to execute, &c. The answer denied all fraud, &c.

Dr. Kirkland by his depositions stated, that the testator during all his illness, and particularly on the 6th of August, was totally incapable of reading, understanding, or transacting, any matter of business ; and his hearing and speech were in a great degree impaired ; that the agreement was never read over and explained to him ; and he did not appear to understand it ; being then in a state of wandering and insensibility ; that the deponent and Colborne, when they signed, did not know the nature \* of the agreement ; [\* 75] but supposed it to be a mere lease. They were requested by Baines to stay, to witness the execution of a paper. The deponent expressed to Colborne his surprise and disapprobation, that Baines should prepare the paper : the Attorney having been at the house that morning. The deponent meeting Elizabeth Willan, the testator's wife, upon the stairs, told her, it was a pity to disturb him : as he had already undergone great fatigue that morning ; and asked her, what all this business meant ; to which she answered, it would soon be over : it was a trifle, nothing. They were afterwards called up by Baines ; and at his request witnessed the signing.

Elizabeth Willan, widow of the testator, stated, that she sent for the Defendant by the testator's desire : her letter, dated the 5th of August, stating, that his uncle was very ill ; " and, as he wishes to give you the preference of Hornsey, begs you will come down to-morrow morning, and talk about it ; as it may be necessary to be settled immediately ;" and desiring, that Baines may come down immediately. He was sometimes at the testator's eight or ten months together ; was much esteemed by him ; and a man of probity and character. The Deponent was not present at any conversation between them and the testator : when the Defendant came, having quitted the room ; leaving them together. She believes, he had his reason and understanding then ; as he had upon that day ; and does not recollect any particular occurrence, to induce her to believe, he had not then. About a quarter of an hour after the Defendant and Baines left the testator he sent for her ; and asked, whether the Defendant was gone ; and, being informed, he was not, desired him to be sent for ; and said to him in her hearing, " John that agreement must not stand. It is giving the estate away." The Defendant said, " you, \* Sir, have left the estates to my son in failure of [\* 76] William Willan's having children : so I shall be making the farm better : " adding, " If you do not approve of it, when you are better, the agreement shall be cancelled." Young, the testator's attorney, came to the house that day about a Codicil to his Will, in

consequence of a letter, written by the deponent at the testator's desire. She did not recollect meeting Dr. Kirkland upon the stairs, and the conversation, stated by him.

The evidence was contradictory as to the state of the testator, whether during the whole of his illness he was in a state of incapacity; though very weak; his widow stating, that his mind sometimes wandered. Baines and Colborne, the apothecary, died, before the Bill was filed.

The Decree, pronounced by the Lord Chancellor, declared, that, regard being had to the agreement of August 1792, it would be contrary to Equity to compel the trustees, or the persons beneficially entitled under the Will, to carry the said agreement into execution; that the demise dated the 1st of September, 1795, by the persons, having estates as trustees, was not binding or valid against the persons, so beneficially interested; and ought to be delivered up; and also the agreement of 1792; but that the Defendant John Willan is entitled in Equity to the benefit of the demise, dated the 10th of September, 1790, for the residue of the term; or, if cancelled, to a proper lease for the residue of that term. Directions were given accordingly; including an inquiry, what lasting and substantial improvements had been made by the Defendant John Willan, or by the tenants in possession under a lease from him.

The cause was re-heard upon the Petition of the Defendant.

[\* 77] \* *Mr. Richards* and *Mr. Trower*, for the Plaintiff.—Admitting, that the state of the testator did not amount to general incapacity, he is proved to have been incapable of transacting business, that required thought or reflection. He had no deliberate purpose of giving a lease; unless the transaction of the 6th of August can be so considered. If a Bill had been filed by the Defendant, upon the production of this paper, marked by defects, omissions, and interlineations, the grantor, if not in extremity, much an invalid, and, though his attorney was in the house on that day, this paper prepared by Baines, a Court of Equity would not have held it a binding agreement. The expression in Mr. Willan's letter of the wish to give the Defendant the preference of Hornsey, taken with the context, does not afford evidence of a deliberate purpose, such as this paper requires. Does the desire, that he will come down, and talk about it, import, that the Defendant was to have the whole interest. That purpose did not call for conversation and treaty. The shortest codicil would have done; and the attorney was to be there that day. The objection is, not to his general competence, but that he did not comprehend the object and import of this paper: yet Mrs. Willan, a witness, produced by the Defendant, whose evidence both upon the direct and cross-examination corresponds, proves a glimpse of understanding, appearing by his subsequent observation. If the conclusion is, that the testator did not understand the effect of the paper he signed, the Defendant cannot hold the benefit. The effect is to give him almost the whole of this property immediately, certainly the whole in time: perfectly inconsistent with the intention of ad-

vantage to the principal objects of his favor ; among whom are the Defendant's sons. What was meant by this preference, what \* renewal, for what time, does not appear : but it was [\* 78] to be the subject of treaty and contract.

Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Bell*, and Mr. *Wingfield*, for the Defendant.—This Decree is complained of in three respects : 1st, the Bill ought to be wholly dismissed : if not, 2dly, the Defendant ought to have one new lease ; though declared not entitled to a perpetual renewal : 3dly, he should not be required to deliver up the agreement ; but should be left at liberty to bring an action upon it, if he thought proper. Your Lordship made the Decree upon grounds very different from that, upon which it was put for the Plaintiff ; but now abandoned : viz. gross fraud. The judgment, excluding all idea of fraud or undue influence, turned upon this ; that from the intrinsic evidence, and the circumstances attending the transaction, his infirm state of body and mind from illness, and the absence of advice, the agreement appeared to be so extremely disadvantageous to one party, that the Court would not decree a specific performance ; conceiving, that the effect of the transaction was not understood by either ; that it was, not a deliberate act, but the consequence of surprise. Extraordinary advantage to one party, not the effect of fraud, or incapacity, is not a ground for refusing to execute an agreement, with a person, near in blood, an object of bounty : the act, though not testamentary, done in contemplation of death, by a person disposing of property, which he could no longer enjoy ; and the consideration consisting principally of the intention to make a provision for the other party, so nearly connected with him. The extent of the intended bounty, which is the measure of this act, is ascertained only by the agreement itself. This is bounty, not to a stranger, but to a near relation and his family, to the disadvantage of those more remote ; \* and a lease had been made to Mr. Hoare, [\* 79] precisely upon the same terms : viz. at a rent to continue ; while the fines would increase *ad infinitum* ; which therefore was open to the same objection. The extrinsic circumstances refute the imputation of fraud or surprise ; the wife sending for the Defendant for the purpose of having an agreement executed for the lease of these farms, and also for Baines, a clergyman, the common friend of both parties : the attorney being sent for on the same day for another purpose, the execution of a codicil ; not being consulted upon this subject. These circumstances prove, not surprise, but a pre-existing, deliberate, purpose ; to be carried into effect by the assistance of that friend, without professional advice ; as a subject of bounty, not of bargain. The effect of the conversation is no more than that, after the act was completed, he repented ; and would have undone it. Can a contract be thus defeated by parol evidence with any safety to the transactions of mankind ? The effect may be wholly varied by a slight change of expression, in a conversation, which the witness could not then have thought material ; and to which her attention was never called until her examination, at a considerable distance of

time; her acts, sending for the Defendant for the very purpose of this transaction, and since confirming the agreement by granting a lease accordingly, inconsistent with the turn, given to it by her evidence.

Another important point in this cause is, whether the Defendant, if he had filed a Bill, confining his prayer of relief to one lease, and disclaiming the right to perpetual renewal, must not have had a specific performance to that extent. Being considered entitled to one renewal, he may have an execution of that part of the contract; and

the objection, applying only to the other distinct part, the [\* 80] covenant for perpetual renewal, cannot vitiate the \* whole.

Such an agreement, for perpetual renewal, is in substance only so many distinct agreements, in one instrument: for a lease immediately: another at the end of seven years; and so on. Upon what principle is an objection, confined to one or some of those distinct agreements, to be applied to all in a Court of Equity: one head of equitable jurisdiction being the reformation and correction of agreements, defectively expressed, according to the real intention? The effect of the covenant for perpetual renewal, creating the advantage by the gradual increase of the fines, upon the renewal of the church-lease, was not adverted to: otherwise the intention of bounty would have been executed by giving one renewal, without the covenant; against the effect of which beyond the intention they could not at that moment provide. A Bill therefore, confined to that distinct object, could not have been resisted.

At least the Decree ought not to have ordered the agreement to be delivered up. If no fraud, undue influence, or improper means, were used to obtain it, why should not the Defendant have an opportunity of endeavoring to recover damages from the representative of the party, with whom he contracted?

Mr. *Richards*, in reply.—There is no evidence of an intention to give a single renewal. The letter of Mrs. Willan does not import that. The cases alluded to of reforming a Deed according to the intention, which by mistake was not followed, have no application: the agreement being entire; and that entire agreement executed according to the true intention. Ignorance of the effect of some of the terms of this paper, as to the covenant for perpetual renewal, is admitted; and who can show the intention for one renewal?

[\* 81] \*The conclusion upon this paper is, that the whole was intended, or nothing: no partial mistake appearing. Then, if this is a paper, which he is not to be considered as having signed, not understanding its effect and import, as he should never be charged with it, and it should not have passed from him, the Defendant cannot be permitted to hold it.

*April 26th.* The Lord CHANCELLOR [ELDON].—This Petition of Re-hearing is presented upon three grounds: 1st, that the Bill ought to have been entirely dismissed: if not, 2dly, that the Defendant should be declared entitled to one lease: or, 3dly, that the Decree

ought not to have directed the agreement to be delivered up, but should have left him in possession of it ; giving him the opportunity to make what he could of it at Law. With regard to the second ground, at the hearing I found it extremely painful to refuse that relief ; and I have still the same feeling upon it ; convinced, that, if the party, proposed as the grantor, had lived, and an explanation had taken place between them, some such lease would have been granted : but from the event of his death without any farther explanation the only consideration is, what the Court is authorised to direct.

It is clear upon the Will, the testator intended the benefit in these leasehold estates to be as lasting as that, which could be taken in the freehold estates, the subject of devise in the former part of the Will. It appears also, that the Defendant is a person, for whom the testator had a considerable regard ; and with whom he intended to deal, as a benefit and bounty to him, for some lease, independent of the transaction closed by the agreement, which is the subject of this suit ; the amount of which \*benefit I am unable to state from any evidence. If the agreement was altogether voluntary, the mere result of bounty, this Court for that reason cannot execute it ; if partly voluntary, and partly for consideration, I cannot execute such an agreement without knowing precisely and distinctly, how much is voluntary, and how much for consideration. The evidence contains many circumstances, perhaps requiring the aid of a Jury, before this agreement could possibly be executed ; if not by its own contents liable to objection ; and if the decision is to be upon the true result of all the circumstances ; which I look at quite independent of fraud and circumvention. [\* 82]

Many of the directions, that are given by this Decree for the benefit of the Defendant, could not be part of it, if the agreement is to be left in his hands, to make what he can of it at Law. The Decree however stands, not upon the ground of fraud or circumvention, not upon imbecility of mind only, influenced by bodily weakness, but upon the combined effect of that imbecility and ignorance of the real effect of the transaction ; leading perhaps in some degree to account for the circumstance, that the testator did not understand the agreement ; but not necessarily to be considered as accounting for that : nor is it in my view of the case material ; as I am perfectly persuaded by the evidence itself, that the Defendant did not understand this agreement ; and, understanding it, would not permit it to have the whole effect. The Court, not deciding by loose speculation upon the instrument, laid before it, must attend to the contents of it, originally and finally, as furnishing what is the effect of it.

It occurred to the parties, when preparing this agreement, as necessary in some degree to advert to the circumstance, that the estate was to be purchased every seven years ; that it was proper therefore, if the lease \*was to be renewable for ever, that some consideration should be had as to the fines to be paid by the lessee upon each renewal ; beginning with the first : a cir- [\* 83]



cumstance of some importance with reference to the other object of the Defendant to have one lease. The rent is to be considered with regard, not merely to the present time, and what the farm will now pay, but also to its continuance in future through the whole lapse of time, during which the agreement was to have effect; and the question is, whether this rent is with reference to the annual value, such as would give a fair consideration to the lessor; having regard to the circumstance, that he was to pay the purchase-money for the premises every seven years.

To the argument, that a lease was granted upon the same terms to another person, it is sufficient to answer, that I do not say, this Court would disturb a lease, actually made in pursuance of this agreement, without any other circumstances; the party deciding for himself: but the question is, whether a Court of Equity is to carry into execution such an agreement; or to leave the party to Law, or to order it to be delivered up; when there is an interposition between the agreement and the execution of it. There are many cases, in which the Court will not disturb an agreement, that has been executed; though it would have refused to carry that agreement into execution; and there are also many cases upon the other point; where, refusing to execute an agreement, it will leave the party to make the most of it at Law (1); where a Jury may determine, upon all the circumstances, what shall or shall not be given as damages; and there is a third class of cases, in which the Court,

refusing to carry the agreement into execution, would not [\* 84] stand neuter; but would \*order it to be delivered up.

The instance, that has been mentioned, therefore stands simply on the fact, that such a lease was made; perhaps with a prior agreement; and may be distinguished, 1st, as being an actual lease: 2dly, as being in performance of an agreement, perhaps not attended with such circumstances as attended, and immediately followed, this agreement.

I repeat, that I do not agree with the opinion, expressed by Lord Thurlow; that, where a man, entitled to an estate of inheritance, agreed to make leases, with covenant for perpetual renewal, each lease to contain the same covenant for ever, that was a species of contract, not to be executed. I disavow that doctrine upon this ground; that it has been so long held, that such a covenant ought to be carried into execution, that whether the judgment was originally right or wrong, it is so covered and sanctioned by decision, that it would be infinitely too dangerous now to interpose a new rule in such cases. This is however perfectly a different case in that respect. It is impossible, that any persons, executing this agreement, could have understood it; and the circumstances prove, that they did not understand it. Consider the effect of it. Every seven years the lessor is to re-purchase, and to re-let for ever at the same rent.

(1) *Ante*, *The Marquis of Townshend v. Stangroom*, vol. vi. 328; *Mortlock v. Buller*, x. 292.

The consequence is perfectly clear ; that, unless the rent is enormous with reference to the present value, the lessor must purchase for the purpose of making good his covenant at the expense of a consideration, that will leave him nothing out of the rent. The bargain is therefore upon the face of it the effect of surprise upon both parties.

Considering it unfortunate, that the evidence of Mrs. Willan was introduced, as it was, yet, having heard it, I must give attention to it. The Defendant's answer according to that evidence, that the \*improvement would be for the benefit of his [\* 85] sons, would be correct ; if the payment of the fines did not eat out the value. The Defendant adds, as an honest man, that, if his uncle gets better, it shall be set right. That expression, it is contended, means only, that the agreement should be cancelled, if the Defendant got better ; but, if he did not get better, the Defendant would insist upon it ; but according to my opinion that is not a reasonable construction of that declaration ; which is a declaration, that would distinguish this from the transaction with Hoare ; even if that had rested in agreement, without an actual lease ; and it is sufficient with reference to an instrument, containing stipulations, which I think ought not to be carried into effect, to have the consent of both parties, that it shall not be executed.

With regard to the question, whether, if this agreement is not to be executed entirely, it ought to be executed to the extent of giving the Defendant one lease for twenty-one years, wishing to give him that, I considered very anxiously, whether I could do it under the sanction of some principle, adopted and recognized in the proceedings of this Court ; and if this could be represented as an instrument, containing so many separate agreements for distinct leases of twenty-one years, each lease renewable every seven years, if I could so construe it, I should think, I was getting forward to the completion of a purpose, which the testator and the Defendant would have completed ; if death had not intervened. But I cannot from this paper ascertain any terms, which the lessor meant to propose, or the lessee to accept, for a lease for twenty-one years ; though I have little doubt, that the uncle, if he had lived, would have given the Defendant at least one lease for twenty-one years.

\*The last consideration is, whether this agreement [\* 86] ought to be delivered up ; and I think the Decree right in that respect : not upon the ground, that the Defendant could not maintain an action ; which he would have a right to bring ; though I am not aware, what action he could institute effectually. If the Decree should be altered in this respect, it would be necessary very materially to alter it in another ; as it contains directions, beneficial to the Defendant, to which, meaning to bring an action, he would not be entitled ; as he cannot be entitled to recover damages for the breach of the agreement, and also to the benefit of those directions. In that view of it also it would be necessary to have an issue ; to try the effect of those circumstances, with reference to which I for-

bore to give any judgment. It is not sufficient to authorize a Decree for delivering up this agreement, to show, that it was obtained by surprise, with regard to the effect of it; as in many cases upon that ground the Court, refusing to execute, would leave the parties to make as much as they could of it at Law. The question is, whether under all the circumstances here is such a case; and I think, there is enough in the circumstances, particularly the evidence of Mrs. Willan, to authorize a Decree, that no use should be made of this instrument either at Law or in Equity: the effect going farther than they intended. The result of her evidence, and of the paper itself upon the face of it, is, that this is a case of surprise, in which the Court will not permit the agreement to continue in the hands of the person who has obtained it.

The Decree was accordingly affirmed.

1810, *April 23d*. The Defendant, having appealed to the House of Lords, pending that Appeal presented a Petition for  
[\* 87] leave to file \*a Bill of Review. The object of this application was represented to be to introduce new evidence in opposition to that of Mrs. Willan, as to the conversation, that passed after the execution of the agreement.

Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Bell*, and Mr. *Wingfield*, in support of the Petition.—Admitting the general doctrine as to Bills of Review, that the new matter, upon which such a Bill is necessary, must have come to the knowledge of the party since the Decree, or since such time as the Court could have used it to his advantage in the former cause, as in the case (1), mentioned by Lord Hardwicke, of a deed, found in an old trunk, supposed to contain immaterial papers: and nothing leading to it, the principle applies to this case: new testimony; which, though certainly within the Defendant's reach before, he had no reason to consider material: the conversation with Mrs. Willan, to which it applies, and on which the Decree most materially proceeded, not being in issue: appearing in evidence by the spontaneous declaration of the witness, not in answer to any interrogatory: the Defendant therefore having no opportunity of cross-examining to it. If the Plaintiff had by a positive averment in the Bill, that such a conversation took place, made it a point in issue in the cause, and examined Mrs. Willan, the only witness to it; a Decree could not have been obtained upon her single evidence against a positive denial by the answer (2). The effect therefore of not putting it in issue is, that a Decree is obtained upon the evidence of a single witness to an averment, which would  
[\* 88] unquestionably have been denied \*by the answer. The Defendant means to prove, that this witness never saw the

(1) *Jacobson's Case*: cited by Lord Hardwicke, 1 Ves. 435. See 1 Ves. 434; 2 Ves. 576, 597; 3 Woodd. 379.

(2) *Pilling v. Armitage*, ante, vol. xii. 78, and the references in the notes, p. 80; ii. 244.

testator, after the agreement was executed ; that she must therefore have been mistaken ; and this conversation, if it passed, must have preceded the execution of the instrument ; and then it would have no weight ; as there might have been a change of purpose. The case of *Jones v. Jones* (1) has a considerable application to this question.

Mr *Richards* and Mr. *Trower*, against the Petition, were stopped by the Court.

The Lord CHANCELLOR [ELDON].—Several of the grounds, stated in support of this application for leave to file a Bill of Review, that, for instance, that no case of fraud and imposition was proved, all indeed, except this point, whether new evidence is to be introduced, for the purpose of procuring a reversal of the Decree, will be open upon the appeal. The material allegation at present is, that the Defendant was surprised by the testimony, given by Mrs. Willan : the conversation, which is the subject of her evidence, not being related in the pleadings : nor communicated in any manner to the petitioner or his agents, before that testimony was given : so that he had no opportunity of inquiring into it. If by that is meant, that it was not distinctly put in issue, that is true : still however there may be a question, whether, having regard to what is in issue, that evidence might not be read ; as I cannot agree, that this conversation, though not distinctly put in issue, does not relate to what is in issue ; and it is admitted, that this evidence, which came out, not, as was at first supposed, on cross-examination, but on the examination in chief, though not in answer to an interrogatory, was read on the part of the \* Defendant ; which circumstance alone raises considerable difficulty. [\* 89]

Though I do not know an instance of an application for leave to file a Bill of Review, while an Appeal was depending in the House of Lords, I do not say, it may not be : yet the Court must upon such a petition under those circumstances consider, what is just with reference to that Appeal ; and it must be observed, first, that the Defendant had the cause re-heard ; and then appealed to the House of Lords : that Appeal not staying the execution of the Decree (2) ; and now desires having subjected the party, in possession of the Decree, to all the consequences of an Appeal, at the same time to involve him in another suit, upon another state of circumstances and evidence, relating to the same cause, in which the party is involved at the same time. It is necessary to guard him against the oppression and injustice of that double proceeding.

It is supposed, that this Decree stands upon the evidence of Mrs. Willan ; and would not have been pronounced, if the Court had not been mainly influenced by her evidence. Admitting, if that is correct, that the Decree could not stand, I deny, that the Decree has that foundation ; disavowing any intention to rest it upon her evi-

(1) 3 Atk. 110.

(2) See the General Order of the House of Lords, *ante*, vol. xv. 184 ; and the note, 185.

dence; or to have made any other Decree, if her testimony had not formed part of the evidence. The supposition, that, I should not have pronounced the Decree, if that evidence had not been given, if merely the effect of misunderstanding; conceiving, that without it there is sufficient ground for relief. I have in the Decree expressed the principle, on which I made it; and would have stated  
 [\* 90] that evidence as the particular ground, had I \*relied upon it. I think therefore, the new evidence, now proposed, ought not to be received; and it would be too much to grant a Bill of Review; when I conceive, nothing ought to follow from it.

The Petition was dismissed with Costs (1).

1. THAT mistake or surprise, upon either party to an agreement, may be a sufficient reason why equity should refuse to execute such agreement, see, *ante*, notes 3, 6, to *The Marquis Townshend v. Stangroom*, 6 V. 328; but it does not follow, that in every case where there has been any sort of surprise upon a contracting party, he can obtain a decree to have the contract delivered up: *Mortlock v. Buller*, 10 Ves. 305.

2. A Court of Equity never lends its assistance to perfect a mere voluntary contract: see note 2 to *Colman v. Sarrell*, 1 V. 50, and note 5 to *Curtis v. Perry*, 6 V. 739.

3. A covenant for perpetual renewal must be very clearly expressed to be effectual; for no Court will, by construction, aid an agreement leading virtually to a grant in perpetuity; but, when that appears to have been clearly the intent of the parties, it will be enforced: see note 4 to *Taylor v. Stibbert*, 2 V. 437.

4. As to the importance of the rule that proceedings under a decree obtained in equity should not be stayed by an appeal to the House of Lords, see the references cited in note 4 to *The Canons of St. Paul's v. Crickell*, 2 V. 563.

5. With respect to the danger of allowing re-examination of witnesses, see the notes to *Sandford v. Paul*, 1 V. 398. And as to examinations before the Master, see the notes to *Parkinson v. Ingram*, 3 V. 603.

## FIELDING v. WINWOOD.

[ROLLS.—1809, MAY 1, 2.]

THE want of surrender supplied for a widow against a collateral heir, namely, a sister: whether provided for, or not.

As to a son, *Quere*.

In supplying the want of surrender for a widow it is immaterial, how ample or scanty her provision may be, [p. 92.]

IN the year 1767 Edward Pinches and Sarah, his wife, were admitted to certain copyhold premises, held of the manor of Hampton Court, to the use of them during their lives and the life of the survivor; and after the decease of the survivor to the use of the heirs and assigns of Edward Pinches for ever.

Edward Pinches by his Will, dated the 18th of March, 1776, gave

(1) See, *post*, 216; vol. xix. 590, the farther progress of this cause.

and devised to his said wife all his freehold and copyhold estates of what nature or kind soever, to hold to her, her heirs and assigns for ever; subject to an annuity of 2*l.* to be paid to the testator's sister Ann for life.

Sarah Pinches, the widow, by her Will, dated the 2d of September, 1805, gave the said copyhold estate (describing it), with all her household furniture and other property whatsoever, to the Plaintiffs, her nephew and niece, as tenants in common. Sarah Pinches died in January, 1806. Edward Pinches had not surrendered  
\* the copyhold estates to the use of his Will, the legal es- [\* 91]  
tate in which therefore descended to his two sisters, Ann  
Pinches and Hannah Winwood, as his customary heirs.

The Bill was filed against Elizabeth Winwood, to whom the legal estate in those copyholds had descended; praying, that the Defendant may be decreed to surrender to the use of the Plaintiffs, as tenants in common.

The answer denied the title of the Plaintiffs, or that Sarah Pinches, if living, would have been entitled, to have the surrender supplied; stating, that at the death of her husband she was entitled to an estate for her life in the copyhold premises under the surrender, stated in the Bill; and that she was also entitled to an annuity of 30*l.* during her life, reserved by Edward Pinches upon a sale of freehold estates, as a part of the consideration; and, that at the death of Edward Pinches his sisters derived their principal support from their labor.

Mr. *Leach* and Mr. *Daniel*, for the Plaintiffs, cited, *Chapman v. Gibson* (1), with the observations, stated by Mr. Sugden (2) from Lord Alvanley's Manuscript, supporting his opinion; and *Hills v. Downton* (3); where that decision was approved, and the Lord Chancellor seems inclined to support the equity even against a son, having no provision.

Mr. *Alexander*, Mr. *Hollist*, and Mr. *Roupell*, for the Defendants, added to the authorities, collected in the two cases  
\* cited, *Biscoe v. Cartwright* (4); and said the Register's [\* 92]  
Book agrees in effect with the Report.

Mr. *Leach*, in the reply, said, that case had been long over-ruled.

*May 2d.* The MASTER OF THE ROLLS [SIR WILLIAM GRANT].— Upon looking into the cases I find, that the difference of opinion between Lord Rosslyn and Lord Alvanley is reduced merely to this: whether a surrender is to be supplied for the wife against an heir, unprovided for, when that heir is the son of the devisor. It is agreed by both of them, that upon the later decisions it is immaterial, how amply or how scanty the provision for the wife may be.

(1) 3 Bro. C. C. 229; see page 232.

(2) Sugden's Law of Vendors and Purchasers, 2d edit. Appendix of Cases, 567. In line 24, for "widower" read "widow, or." Sugd. Pow. App. No. vi. 550.

(3) *Ante*, vol. v. 557.

(4) Gilb. 121.

Lord Alvanley, in the case of *Chapman v. Gibson* (1), admits in effect, that a collateral heir has no right to resist the wife's equity; stating (2), that the argument, that the heir was unprovided for, was in that case not material; "for according to the cases a wife has a right, where there is not an equal moral obligation violated by giving her relief."

Clearly there is not the same obligation to make a provision for a collateral heir as for a wife or children. In the case of *Hills v. Downton* Lord Rosslyn seems to question even that limitation upon the equity of the wife, and that distinction in favor of the heir, being a child of the devisor; and his Lordship seems to be of opinion, that the Court ought never to enter into the consideration of the heir being or not being unprovided for. It was unnecessary [\* 93] there to decide \* that point; as the heir was provided for.

Upon another ground it is unnecessary here to decide it; as this is the case, not of a son, but of a collateral heir; and it seems settled, that in such a case the wife's equity is not to be resisted (3).

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A PREVIOUS surrender to the use of the testator's will is no longer necessary to give validity to testamentary dispositions of copyholds: see stat. 55 Geo. III. c. 192.

## DALTON v. CARR.

[1809, MAY 6.]

AFTER ANSWER not of course to enlarge publication until Answer to a Cross Bill.

A MOTION was made by the Defendant to enlarge publication until after Answer to the Cross Bill. The Bill in the original cause was filed on the 29th of July: the Answer on the 20th of February following; and the Cross Bill very lately.

Sir Samuel Romilly and Mr. Bell, in support of the Motion, contended, that it was of course, to enlarge publication at any time.

Mr. Hart, for the Plaintiff, in the original cause, denied that; referring to *Ramkissensent v. Barker* (4), *Creswick v. Creswick* (5), and *Alyet v. Easy* (6).

The Lord CHANCELLOR [ELDON] said, the practice to enlarge of

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(1) 3 Bro. C. C. 229.

(2) 3 Bro. C. C. 232.

(3) In *Rodgers v. Marshall*, *post*, vol. xvii. 296, the Master of the Rolls held, that a surrender should not be supplied in favor of a child against a grandchild unprovided for. See the note, *ante*, iii. 68.

(4) 1 Atk. 19; see page 21.

(5) 1 Atk. 291.

(6) 2 Ves. 336.

course at any time, perhaps just as the Plaintiff in the original cause was about to get his Decree, would be much too strong.

The Order was not made (1).

In *Cook v. Broomhead*, 16 Ves. 135, it was laid down as the rule of practice, that where a cross-bill has been filed, and no proceeding has been taken in the original cause, publication may be stayed of course, until answer to the cross-bill; but, where any proceeding has been taken in the original suit, publication therein cannot be stayed, unless the defendant in the cross-cause is in contempt; or a special case is made on affidavit: see, also, *Edwards v. Morgan*, 11 Price, 309.

### LADY ORMOND v. HUTCHINSON.

[\* 94]

[1809, APRIL 29; MAY 2, 5, 6, 9.—ANTE, VOL. XIII. 47.]

ACCOUNT against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in Ireland; and inquiries into the circumstances of a lease, granted under his direction, and in which he took an interest, and a reversionary lease to himself(a).

A PETITION of re-hearing was presented by the Defendant in this cause; complaining of part of the Decree pronounced by Lord Erskine (2).

The Bill was filed in 1803: the Plaintiff being entitled for life to the estates of the late Lord Wandesford in Yorkshire; and being also his personal representative; stating, that Lord Wandesford was seised in fee; and the Defendant was his steward, agent, receiver, and confidential agent and solicitor; that a settlement of accounts between them had taken place in 1780; and a considerable balance was due from the Defendant at the death of Lord Wandesford. He continued in the situation of steward and receiver under the Plaintiff: but there was no farther settlement of accounts. In May, 1773, a proposal in writing was made by Ralph Lodge to Lord Wandesford to take a lease for twenty-one years of estates at Hipswell and Hudswell, at a clear rent of 900*l.*; stating, that the woods of Hipswell Park and the West Wood shall be excepted out of the lease; and that he will covenant to fence the same, and keep such fences in repair; that, as he proposes to enter into a very extensive plan of improvement, he expects the liberty of inclosing at his own expense such parts of the moors and commons as he shall think expedient;

(1) *Post*, *Cook v. Broomhead*, 133.

(a) 1 Story, Eq. Jur. § 462; *Phillips v. Belden*, 2 Edw. I. See, *ante*, note (a) *Muddleditch v. Sharland*, 5 V. 87.

As to contracts between an attorney and client, see, *ante*, note (a) *Newman v. Payne*, 2 V. 199. As to purchases by an agent, note (a) *Massey v. Davis*, 2 V. 317. As to purchases by a trustee of a *cestui que trust*, note (a) *Whitcomb v. Lawrence*, 3 V. 740; note (a) *Campbell v. Walker*, 5 V. 678.

Courts of Equity will open and examine accounts after any length of time in respect of fraud. See, *ante*, note (a) *Beaumont v. Boulbee*, 5 V. 485.

(2) *Ante*, vol. xiii. 47; see the references.



with all liberties, except in the two woods; that by the money he proposes to expend in the improvement he doubts not but that at the expiration of twenty-one years Lord Wandesford's estate will be doubled in value.

[\* 95] \* The Bill farther stated, that Lord Wandesford, being informed by the Defendant, that Lodge's proposal was advantageous, executed the lease in September 1773; and the interest in a part of the premises was within two months afterwards assigned to the Defendant; who also obtained in 1776 a reversionary lease of the premises, so assigned to him, and other parts of the premises, comprising five hundred and forty acres, from the expiration of Lodge's term for twenty-one years and farther during the life of the Defendant; at the rent of 20*l.* 7*s.* 6*d.*; charging, that both leases were highly disadvantageous to Lord Wandesford; that the rent of the reversionary lease particularly was inadequate; and the transaction contrary to the duty of the Defendant, as agent and confidential adviser; that it was understood and agreed between him and Lodge previously to the execution of the former lease, that a great part of the premises should be assigned to the Defendant; and praying accordingly, that the lease of the 15th of July, 1776, may be declared void; as having been unduly obtained: that a general account may be taken of all dealings and transactions between the Defendant and Lord Wandesford, from the account, settled in 1780, to the time of his death, and with the Plaintiff since; that the Defendant may be charged with the full rent or value of the premises, held by him under the assignment from Lodge, and the reversionary lease, and as tenant at will, at the same rent, that would have been paid by a tenant, if no such assignment had been made; and an account of timber felled, &c.

The Answer stated, that Lord Wandesford viewed the lands, comprised in Lodge's lease, in company with three persons: W. T. Esq. and a clergyman, and a farmer; that Lodge assigned part of the premises to the Defendant at a rent of 125*l.*, with the consent

[\* 96] of Lord Wandesford; \* who agreed to give him an extended lease; and on the faith of that promise he expended about 4000*l.* in building; that other parts of the premises were assigned to him by Lodge about a year afterwards, under a verbal agreement between him and Lodge, at the instance of Lord Wandesford, previous to the lease to Lodge, that he should assign particular parts to the Defendant. A farther deed was executed by Lodge, dated the 20th of November, 1773, but not executed until the 24th of September, 1774; by which Lodge agreed, in consideration that the residue of the premises might be more effectually cultivated, improved, and managed, that the lease of 1773, as to one moiety of the residue of the premises, with some exceptions, subject to the rent of 900*l.* should be in trust for the Defendant; that the reason of that was Lodge's inability to cultivate and manage the premises, or to advance sufficient money for that purpose. The Defendant denied all undue influence, &c.; and insisted, that the reversionary

lease was in consideration of large expenditure previously in building, &c. under the said agreement. He admitted a general direction by the Plaintiff or her late husband to remit the rents from time to time to them in Ireland; that no account had been furnished until 1804; and that he acted as manager for Lodge. He stated Lodge's assignment to him on the 29th of November, 1773, of two hundred and seventy-one acres, at a rent of 130*l.*, afterwards reduced to 125*l.* by indorsement, dated the 1st of October, 1774: another assignment to him, of eighty acres, also part of the premises demised to Lodge, at a rent of 45*l.*; and the declaration of trust as to a moiety of the residue of the premises, as before stated. He denied, that the reversionary lease was disadvantageous, &c.; and insisted, that the lease to Lodge was at a better rent than any other tenant would have given, &c.

\* The Decree, pronounced in this cause by Lord Er- [\* 97] skine (1), directed a general account of all dealings and transactions, between the Defendant and Lord Wandesford from the time of the settlement of an account between them in 1780, to the death of Lord Wandesford in 1784; and between the Defendant and the Plaintiff and her late husband since, and of all sums received, or which might have been received, without wilful default; and it was ordered, that the Plaintiff should be at liberty to charge the Defendant with the annual amount of the rents, reserved by the lease of September, 1773, granted to Ralph Lodge, and the reversionary lease of the 15th of July, 1776, during the continuance of such leases; without prejudice to the question, whether the Plaintiff might be entitled to charge the Defendant with any rent beyond the said reserved rents; and it was ordered, that the Master should set a value by way of rent upon those parts of the estates, which should appear to have been from time to time occupied by the Defendant, as tenant at will: the Defendant to be charged with such rent. An account was directed of all timber felled, and underwood cut, &c., and of all money, properly paid or disbursed; with annual rests; without prejudice to the question, whether the Defendant ought to be charged with interest; and an inquiry as to claims upon the annual balances in his hands; and who has the custody or possession of the lease of 1773, or the counter-part: when the Plaintiff was first informed of the reversionary lease; and whether any, and what, lasting improvements were made by Lodge, or the Defendant.

An inquiry was also directed, what was the rent, at which the land, comprised in the lease of September 1773, was actually let, when such former lease was granted to Lodge; and what [\* 98] \* was the value of the land at that time to be let to a tenant from year to year: what part of those lands was occupied by the Defendant during the continuance of that lease for his own use: the consideration of the reversionary lease of the 15th of July, 1776; whether it consisted in any and what degree of substan-

(1) See the Report, *ante*, vol. xiii. 47.

tial improvements ; and whether any and what sums were expended by the Defendant in such improvement : the Master to be at liberty to receive the answer and examination of the Defendant upon that subject : what was the value of the lands, comprised in the reversionary lease, to be let to a tenant from year to year at the time such reversionary lease was granted, and also at the time, when the said lease came into possession ; reserving the consideration of interest.

At the re-hearing, the counter-part of Lodge's lease was produced. The petition prayed, that the cause may be re-heard, as to the inquiries directed respecting both leases.

Sir *Arthur Piggott*, Mr. *Hart*, and Mr. *Heald*, for the Defendant, in support of the Petition of Re-hearing.—This Petition complains of the whole of this Decree, except the accounts, which could not be resisted. The Bill was not filed until nineteen years after the Plaintiff's time accrued, thirty years after the execution of the lease to Lodge, and twenty-seven years after the reversionary lease to the Defendant : which leases the Bill seeks to set aside. No evidence of fraud being produced, what foundation is laid for all these inquiries? It is not sufficient to state at this distance of time, that the party to these transactions was a steward : the principal having been silent during all the remainder of his life: the presumption therefore being, that his successors \* are now doing, what he would not have done, or wished to have done.

[\* 99] A steward may deal with his principal ; but he must be able to show, that no advantage was taken : that the principal was dealt with, as a just steward would have advised him to deal with another person. The result of what can be collected at this distance of time is, that the principal, with perfect knowledge of his rights, lived long without complaint ; and these representatives took no step for several years after their title accrued. Are not these circumstances of confirmation? Can they at this distance of time undo the solemn acts of their ancestor, upon suspicion, collected merely from the circumstances, that the Defendant took a portion of the land, demised to Lodge, and became a partner with him in the rest ; and are such acts and inquiries to be now directed, in effect setting aside the leases, and rescinding the whole transaction, without regard to the expense, incurred in cultivation? The ground of avoiding the lease to Lodge must have been, that it was, though ostensibly a lease to him, in the whole, or in part, for the benefit of the Defendant ; to be considered therefore upon the principle, applicable to a confidential agent, obtaining a beneficial lease, such as a confidential agent ought not to advise his principal to grant. The charge to that effect is denied ; and is not supported by evidence. The lease to Lodge, the counter-part of which was not before Lord Erskine, but is now produced by the Plaintiffs, appears to be upon the usual terms, with all fair and reasonable covenants in such leases ; containing nothing, having a tendency to impeach it.

The cases, *Lord Hardwicke v. Vernon* (1), and *Beaumont v. Boul-*

(1) *Ante*, vol. iv. 411 ; see the note, 418 ; xiv. 504.

bee (1), are perfectly different from this. Such inquiries are directed only where the facts could not be proved at the hearing, or are rendered doubtful by conflicting evidence; as in *Lord Hardwicke v. Vernon* upon the fairness of the rent. In *Beaumont v. Boulton*, notwithstanding the enormous profit, the communication of the level, and the improvidence, against which the principal ought to have been protected, and the inference, from the letters, that, before the Bill was filed, his eyes were not properly opened, the Court felt great reluctance upon the lapse of time to charge the agent. An agent is not required to give better terms than he would be bound to procure from a stranger.

The fact, that the Defendant was the law agent of Lord Wandesford, is not the true result of the passage in the answer, upon which alone it rests; stating, that the Defendant acted, not only as steward, but as agent and receiver, except that he did not act as the law-agent otherwise than in preparing leases, notices to tenants, deputations to game-keepers, &c.: not within the office of an attorney, as commonly understood. This resembles the late case of *Andrews v. Mowbray*; in which the purchase was established on the ground, that the Defendant was not by the character he filled disqualified as a purchaser from the persons, to whom he stood in the relation, resulting from that character, by a fair contract. That relative situation is not alone sufficient: beyond that here is no more than suspicion; and fraud is never presumed: if denied by the answer it must be clearly proved. The lease to Lodge is admitted to have been upon his proposal: of a nature to attract the attention of the landlord. This Defendant, near the age of eighty, when the Bill was filed, is required to state the value of the land thirty years ago. The reason, that, as it was necessary to go into the Master's Office on one \*account, therefore, many other inquiries [\* 101] should be directed, is not satisfactory.

The Lord CHANCELLOR said, as to the first lease he wished to hear the Plaintiff's Counsel upon the length of time: but as to the reversionary lease the Decree certainly did not go too far.

Mr. Richards, Sir Samuel Romilly, and Mr. Wingfield, for the Plaintiff.—An equity results from the relation of Steward, which does not prevail between other persons. There is at least a ground of suspicion before the Court, sufficient to support the inquiries directed; and the Plaintiff might reasonably complain, that the Decree does not go far enough; confining the inquiry to the value of the lands at the periods, when the leases were executed; and when the reversionary lease fell into possession. One passage of the answer, to the plain interrogatory as to the value, would be sufficient; that this agent is unable as to his belief, or otherwise, to set forth the value to be let per acre either at the dates of the leases, or now. Upon the reversionary lease to himself he ought to have secured for his employer the same advance as against himself, that he had secured

(1) *Ante*, vol. v. 485; vii. 599; xi. 358.

from the other tenants. If in the late case, *Andrews v. Mowbray* (1), the Defendant had been in the situation of this Defendant, as now contended, the purchase could not have been held by him. Standing in this relation, the Defendant is bound to prove, that his conduct in the transaction with his employer was such as the [\* 102] care and integrity of a perfectly \*just steward would have insured in a transaction with a stranger. Did not the duty, imposed by that character, require him to insert in Lodge's lease security for the improvements, proposed by Lodge as the consideration? Of the necessity and means of obtaining that security, the Defendant, being an Attorney, could not be ignorant: yet the lease has no such covenant; and, with the additional, most important, facts, that the Defendant obtained such considerable interests, becoming immediately the manager for the lessee of the whole of the premises, within two months taking a sub-demise to himself of a part, becoming jointly concerned with the lessee in the remainder, and soon afterwards procuring a lease in reversion, the inference is obvious. The reason, given by the answer, for the interest, taken by the Defendant, is, that Lodge was not possessed of property to cultivate, manage, or improve, such a farm. Then consider the proposal of Lodge, and the manner, in which it was carried into execution by the Defendant: the fair import of the proposal being a consideration by large expenditure in improvement: this steward permitting his principal to execute a formal lease, without any stipulation for laying out a shilling on that object; and now avowing his knowledge, immediately afterwards, that the person, undertaking so to improve as to double the value during the lease, was not of ability to cultivate the farm, as it was.

Under such circumstances, with such a train of deception, the length of time could not have been urged against the original principal: nor can it against the present Plaintiff; whose residence in Ireland laid her equally open to imposition.

The reversionary lease was obtained under a representation, the consequence of those transactions, that large sums had been [\* 103] expended, which the tenant was not \*bound to expend: a representation, that could not have been made, if the Defendant had by the lease to Lodge secured the terms of the proposal. There is nothing, except the recital of that lease, to show, that Lord Wandesford was aware of the circumstances, and acquiesced; without which length of time in the case of a steward is nothing. In all the accounts Lodge is represented as the tenant of the farm; and the fact, that the Defendant had become the tenant, is suppressed. Though generally a person is bound by the recitals of a lease, the Court would not press that principle against a landlord as to the recitals of a lease, presented to him for execution by his steward. The consequence of holding a nobleman bound by

(1) In Chancery, The Bill to set aside a purchase by a land-agent was dismissed, upon the circumstances, by a Decree at the Rolls, affirmed upon appeal by Lord Eldon, C.

every recital in every lease, so tendered to him by the person employed as general land steward, would be most dangerous and extensive.

Sir *Arthur Piggott*, in reply.—The principles, applicable to the case of trustee and *Cestui que trust*, guardian and ward, attorney and client, have no application to this case of the proprietor of an estate and his agent for the management of that estate. This is not the case of a person under any legal or mental incapacity; making presumptions necessary, which would not be raised in favor of other persons. The effect of inquiring into transactions of this nature after such a lapse of time is probably great injustice to individuals, and insecurity to property in general. The objection, that a nobleman should not be bound by the recitals in the leases, presented to him for execution by his steward, cannot apply to a lease to the steward himself. The lessor cannot upon such general topics be considered ignorant of the contents. The reason of confining the inquiry to substantial improvements must be, that the Defendant may not at this distance of time have the vouchers: [\* 104] a reason, that extends also to his disbursements.

*May 9.* The Lord CHANCELLOR [ELDON].—The question upon this Petition to re-hear part of the Decree, pronounced by Lord Erskine, is, whether, having regard to all the circumstances of the case, the relation of the parties, and the nature of the answer; the Court was justified in directing these inquiries; and, if that was right, whether these inquiries can furnish a result, on which the Court can act farther. The Bill prays a general account of all dealings and transactions with the Defendant; and mentions the two leases of 1773 and 1776 in this way; that the Defendant insists, he is to account for the value of the lands, occupied by him, only upon the principle of the assignment and demise, taken by him: the Bill contending, that a case will appear by the answer, or by evidence, (of which there is none, and therefore it must be taken upon the answer alone) from which, regarding the value of the subjects assigned and demised, the nature of the consideration, the nature of the obligations, resulting from the employment, with which he is supposed to have been clothed, he ought to be charged upon different principles; as if he had not taken such assignment and such lease: the Bill not extending the prayer of relief to an account of the rent of the premises, comprised in the lease to Lodge; but confining it to the lands assigned by him to the Defendant. Lodge is not before the Court: nor is the Bill calculated for a joint account; impeaching only the interests of the Defendant under the assignment from Lodge and the reversionary lease.

The answer admits, that the defendant, who was appointed steward and receiver in 1772, was also, as such steward and receiver, \*the confidential agent and manager of the es- [\* 105] tates; in which situation he continued until the death of Lord Wandesford in 1784; and afterwards acted in the same char-

acter for the Plaintiffs until near the time, when the Bill was filed. It remains doubtful upon the answer, whether the Defendant, who was the confidential agent of Lord Wandesford, before the lease was made to Lodge, was consulted upon the proposal; which according to the answer, and I take it so, was handed by Lodge himself to Lord Wandesford; who had the sort of advice, represented by the answer: a circumstance of some, but not much, weight. That paper was not before Lord Erskine. Upon that proposal the Defendant, not the general law-agent of Lord Wandesford, but the law-agent in this sense, that he drew his leases, was directed to prepare a lease; which was so drawn as by no means to secure the benefits, held out by this proposal; leaving it very much to the lessee, whether he would embark in the improvements, or not; if his circumstances enabled him to pursue his own purpose. The answer binds the Court in a great degree to say, that at the time the proposal was adopted the Defendant had not contracted for any interest.

The circumstances between September and November 1773 have great singularity; and create much suspicion. Lord Wandesford is represented by the answer himself to have stipulated with Lodge, not that part of the premises should be excepted, and be demised by Lord Wandesford to the Defendant, but that Lodge should assign to him a part at a rent of 130*l.*; afterwards reduced to 125*l.*; and it is very singular, that as early as November 1773 the Defendant had agreed with Lodge, either at his own or Lodge's proposal, that, besides the assignment of those premises, the Defendant should become in effect tenant of a moiety of the commons, to be [\* 106] improved; and \*was to be at liberty to make that improvement by inclosing himself. As early as between September and November 1773, the execution of the original lease and the assignment, the Defendant must have been apprised, that Lodge's circumstances were perfectly inadequate to carry on that plan of improvement, held out by his proposal: the Defendant putting the propriety of his having a share in the transaction upon the inequality of Lodge to execute that proposal. Putting the propriety of his taking an interest upon that ground, he has made it clear, that in that short period of two months he must have received considerable information, which it is to be supposed he had not before September; and farther, that he must have felt some inclination to be concerned in the bargain: yet, unless the Court can infer, that the original bargain was a fraud, and that the Defendant from the beginning was to have an interest, or it can be put upon gross breach of duty, as the lease to Casamajor in *Lord Hardwicke v. Vernon* (1), it does not follow, though great suspicion may arise, that relief can judicially be given.

Another circumstance, that immediately after Lodge had taken his lease the Defendant became his land-manager, is very material with regard to the transaction of 1776; when the Defendant pro-

(1) *Ante*, vol. iv. 411; xiv. 504.

cured from Lord Wandesford, or he gave to the Defendant, the reversionary lease of the premises, comprised in Lodge's assignment to him in November 1773, of another parcel of the premises, demised to Lodge, and by him assigned to the Defendant between November 1773 and December 1776, of another farm, let at 32*l.* a year; and also of one hundred and twenty-three acres, which he had inclosed from the common: a lease for twenty-one years from 1794, and such farther term as the Defendant might live. That addition \*perhaps is not very material: but he takes that [\* 107] reversionary lease, including all those premises: the first parcel assigned, at the same rent of 125*l.*: the second at the same rent of 45*l.*: the third at the same rent of 32*l.*, at which it was then held; and the remaining one hundred and twenty-three acres at no rent whatsoever.

The duty of a steward and land-agent requires him to show, that a transaction, so singular in its nature, and, in general, so little beneficial to the lessor, to whom he was bound to communicate all he knew of the value, was in all the circumstances fair. It may be so: but then the question as to the reversionary lease is, whether the answer, attending to the nature of the account, given by it, does not according to the principles and practice of this Court justify some inquiries; raising, not a loose, vague, suspicion, but a fair, reasonable, judicial, doubt, whether that lease was not granted under circumstances, of which a person, standing in the relation of this Defendant, shall not avail himself against those, with whom he was so connected and engaged. That this lease could not stand, if there is no other consideration than the rent and covenants, seems admitted; and the Defendant found it necessary to set up a farther consideration: viz. that when the farm, the subject of the assignment of 1773, was stipulated for on his behalf by Lord Wandesford, at whose request the answer represents that assignment to have been made to the Defendant by Lodge, Lord Wandesford said, if the Defendant would build upon the premises, he should have another lease: on what terms, at what rent, and with what covenants, the answer is altogether silent: but it is perfectly clear, both by the answer and the instruments, that the promise, stated by the Defendant, of another lease, applied only to the premises in the first assignment.

When that promise came to be \*executed, the instrument [\* 108] recites the lease to Lodge, the assignment to himself; and so far he acts fairly, that he recites the covenant about a moiety of the common. He does not recite the declaration of trust, in 1774, under which he became in effect co-tenant with Lodge of all the premises, except those, held severally by Lodge, at 60*l.* a-year, and those held severally by himself; and the fact, that he was co-tenant with Lodge, does not appear to have been disclosed. The reversionary lease recites farther, that he had laid out 3000*l.*; and in consideration of that expenditure, and the rent and covenants, the lease was made.

The first observation upon this transaction is, that the account,



given of the consideration, very well justifies inquiry, whether it was paid, before that lease was granted: that is, whether this was expenditure previously incurred. He has not averred any thing like that fact; stating merely, that such a sum was expended from first to last: but at what periods appears studiously evaded. It is clear, such a lease cannot stand, if, that consideration was not actually advanced previously. Admitting that it had been paid, then the Defendant was in possession as land-agent, steward, and manager; bound to give his principal the benefit of all the information, which it is to be supposed he really had. Having taken an assignment of part of the premises, demised upon a plan of improvement, by the effect of which it was, not covenanted, but represented, that it would return at the end of the term doubled in value, the question will be, whether that expenditure, considered as previously made, together with the rent and covenants of that lease, having regard to what ought to have been the management and dealing with the land under the covenants in the lease of 1773, binding the assignee, was a fair consideration as between such a landlord and tenant; [\* 109] attending \* to their peculiar relation. Admitting, that a lease should not be set aside on that ground, that the rent is, not grossly inadequate, but a little less than might have been obtained, a Court of Equity must know the circumstances with reference to such a transaction.

As to the reversionary lease therefore my doubt was only, whether these inquiries are calculated to procure that information, which the Court ought to have; not having any doubt, that there ought to be some inquiry; for which this a very strong case. The difficulty with regard to the inquiry, what these lands were worth to be let from year to year at the time the reversionary lease was granted, and when the land fell into possession, is that, though the result of that inquiry may be, that at each period the rent was such as to show conclusively, that this lease ought not to stand, from the magnitude of the rent, which a tenant from year to year would have given at those respective periods, the converse of that does not follow. The inquiry therefore ought to be, as it was in the case of *Lord Hardwicke v. Vernon* (1), whether the annual rent was proper *de anno in annum*; having regard to the covenants and consideration of that lease; as upon a lease from year to year so many different motives may operate from those, inducing a man to take a lease for twenty-one years, that the inquiry should be directed to that species of transaction; enabling the Court to draw a conclusion with reference to the consideration, as applied to a contract of that particular species.

The inquiry therefore should be, whether the sum of 3000*l.* recited as expended, was expended; what was the fair rent, [\* 110] to be reserved in 1776, upon a reversionary \* lease, to commence in 1794; and to be annually made during twenty-one years; having regard to the fact, whether the consideration was,

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(1) *Ante*, vol. iv. 411; xiv. 504.

or was not, paid, wholly, or in part; and to the nature of the engagement and husbandry, covenanted for pending the lease, which actually existed from 1776 to 1794; as at the end of the term the land should have been rendered up, dealt with according to the covenants: an inquiry, what would now have been the value; having regard to what ought to be the state of the land according to the covenants; and to the fact, whether the sum of 3000*l.* was or was not expended previously to 1776. There must also be some inquiry as to the value of the lands in the existing lease; that is, such as were assigned to the Defendant: the Bill applying only to those; not for the purpose of determining at present, whether that assignment can, or cannot be effectual: but as the result may possibly with the other circumstances require some direction with regard to the rent, that ought to be paid for those premises; and it may be necessary upon the result of the inquiry to ascertain, what advantage was made both by the one and the other. Some little alteration is necessary in the direction as to the substantial improvements; and also as to receiving the evidence of the Defendant; admitting, as Lord Erskine thought, that it is very fair, that it should be received. The result of my opinion upon the case is, that the answer upon principle and practice furnishes ground for inquiries; that the inquiries, which have been directed, must be varied in some respects; and, not determining, whether the original assignment can be affected, for which purpose a very strong case in point of value must be made, but thinking it highly probable, that the reversionary lease may be deeply affected, I find it impossible to decide the cause without such inquiries as I have pointed out.

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SEE, *ante*, notes to the S. C. 13 V. 47.

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## HOLLAND v. HUGHES.

[\* 111]

[1809, MAY 16.]

THE general rule for the conversion of personal property, bequeathed for life, with remainders over, into the 3 per cents. held not to attach upon property of a Testator who died in India, under his Will, made there, invested by his Executor in the Company's securities there: but on the arrival of the parties in this Country a Decree was made, that it should be remitted, and invested accordingly (a).

WILLIAM HOLLAND, of Calcutta, in the East Indies, by his Will gave to his wife Rebecca, the sum of 50,000 sicca rupees for her life, to be raised out of whatever property, real or personal, should belong to him at his death; and after her death he bequeathed the princi-

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(a) See *ante*, note (a) *Hove v. Dartmouth*, 7 V. 137, note (a), 151.

pal to, and to be equally divided among, all and every their children, subject to a power to his wife by her Will to vary the proportions. After some other legacies he gave all the residue and remainder of his property, real or personal, &c. to his wife for life, and after her decease to be equally divided amongst their children, or bequeathed by her in the same way, that the legacy of 50,000 sicca rupees should be appropriated by her among them; and failing such child or children, then such reversion or remainder to be at the sole and absolute disposal of his wife; directing, that in case of any deficiency the legacy of 50,000 sicca rupees should have the preference: but if there should be sufficient to pay all the legacies, then the said legacy to be paid as soon as convenient after his decease. The Testator appointed his brother and his wife executors and guardians.

The testator died at Calcutta in June, 1802; leaving his wife surviving, and one daughter, his only child, of the age of two years. The widow proved the Will at Calcutta; and placed out the sum of 50,000 sicca rupees, and other parts of the property, upon securities, at interest in India. In 1802 she came to England with her [\* 112] daughter; and afterwards married John Hughes; \* upon which the testator's brother took probate of the Will in England; and the Bill was filed by him and the infant against Hughes and his wife for an account, to have the property collected, and remitted to this country, and invested, &c.

The Defendants set forth the accounts; and admitted, that the property had been invested in the hands of merchants in India, at 12 per cent. interest, and afterwards in the Company's paper: but they insisted, that the property should not be called in, and remitted, on account of the loss and diminution of the income.

(1) Sir *Samuel Romilly* and Mr. *Gyffin Wilson*, for the Plaintiffs, made two questions: 1st, whether the Defendants are entitled to the large interest then made: 2dly, whether the property should be permitted to remain in India. Upon the latter point they cited the case of *Howe v. Earl of Dartmouth* (2); where the general rule is established, that, where personal property is bequeathed for life, with remainders over, and not specifically, it is to be converted into the 3 per cents.; and insisted that the Court would not allow the infant's property to be out of their reach. Had it been found in the India Government Funds, it might have been permitted to remain: but this investment was made, not by the testator, but by the representative after his death. The infant may have immediate occasion for maintenance; and the property, situated as it is, cannot be applied to that purpose without the delay of a year and a half in remitting the necessary sums to this country.

[\* 113] \* Mr. *Richards* and Mr. *Bell*, for the Defendants.—The Court does not necessarily convert property; but frequently

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(1) The arguments *ex relatione*.

(2) *Ante*, vol. vii. 137.

directs a reference, to ascertain, whether such a change is advisable. The securities of the East India Company are as much Government Stock in India, as the Public Funds here. This is not like the case of *Howe v. The Earl of Dartmouth*; where there were various funds in this country: but this Will was made in India; where the testator resided; and the property was invested, where the Courts of India would have lodged it; and probably a suit was instituted there. Can the removal of the representative to this country make a difference? She may return. Having acted properly as an Indian executrix, she cannot be compelled to refund what she has received under the directions of the Will, merely as she has happened to come to this country; and here, for the purpose of equalizing funds of different kinds, a preference is given to the 3 per cents.

*May 16th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question in this cause arises upon that part of the prayer of the Bill, filed on behalf of the infant child of the testator, which asks, that the widow may account for all the interest, which the legacy has produced, beyond what it would have produced; if it had been brought over to this country, and invested in the 3 per cents. immediately after the testator's death. It appears, that the money was some time in the hands of a merchant at Calcutta; where it produced 12 or 12 1-2 per cent.; and was afterwards invested in the Company's paper, producing 10 per cent. I had great doubt, whether the principle of the case of *Howe v. Lord Dartmouth*, upon \* which the demand against the widow was sustained, could [\* 114] be applicable to a case under these circumstances; and upon consideration my opinion is, that it cannot. Here neither the fund, nor any of the parties interested in it, were at the death of the testator under the jurisdiction of the Court. Neither might ever have come within it. The 3 per cents. is the fund, in which this Court not only makes all the investments of money, paid in under its jurisdiction; but in which it holds that executors ought to make investments; where any are to be made: but, where a testator dies, leaving property, and a family, in a foreign country, it is not the duty of the executor to send the property to England, to be invested. In England, when an executor neglects his duty, either by not making investments, or by not converting the residuary estate, standing in other funds, into the 3 per cents. such neglect cannot vary the rights of other parties. The interests of remainder-men and the tenant for life of personal estate are judged of according to that duty; and they are placed in the same situation, as if the executor had performed it; but in the case before me there is no room for the application of the rule, that what ought to be done shall be considered as done; as I cannot hold, that the money ought to have been brought to England immediately after the testator's decease.

Now that both parties are come here, the infant has a right to have the fund brought here, and invested; and the widow's income must

undergo a consequential reduction : but while the property remained in India, she was entitled to what it produced.

ANOTHER note of this case is inserted in the Appendix to 3 Meriv. 685, where the order made in the cause is extracted from the register's book.

[\* 115]

CHARMAN v. CHARMAN (1).

[1809, MAY 16.]

MOTION to open the enrolment of a Decree, and to stay proceedings under it, to give an opportunity of Appeal, refused : the Decree being made upon the merits : as at law a Judgment by default is vacated on Motion ; not a Judgment on the merits (a).

A MOTION was made on the part of the Defendant to open the enrolment of the Decree, pronounced in this cause at the Rolls (2), in favor of the Plaintiff, on the 23d March, 1808 ; and enrolled in July last. This motion was made for the purpose of letting in the Defendant to appeal from the Decree ; and a part of the Motion was, that all farther proceedings under the Decree should be stayed.

Mr. *Hollist* and Mr. *Newland*, in support of the Motion, cited the cases of *Kemp v. Squire* (3), *Robson v. Cranwell* (4), *Benson v. Vernon* (5), and the subsequent case (6) ; and referred to the practice at Law ; where, although the judgment is regular, yet, if the Plaintiff has not lost a trial, the Court will, on Motion, set it aside, upon affidavit of merits and payment of costs. If the Court should be against them with respect to opening the enrolment, they pressed, (as the Defendant then intended to appeal to the House of Lords), to stay all farther proceeding on the Decree pending the Appeal ; observing, that, although it could not be done, after an Appeal to the Lords had been actually presented, yet while the cause was still in this Court, his Lordship had the power to make such an Order.

Mr. *Richards*, against the Motion.

[\* 116] The Lord CHANCELLOR [ELDON], after observing, that it was admitted on both sides, that the merits of the case had been fully gone into at the Rolls, said, although it was true, that at Law a judgment by default might be set aside, yet there was no in-

(1) *Ex relatione.*

(a) 2 Smith, Ch. Pr. 9.

(2) *Ante*, vol. xiv. 580.

(3) 1 Ves. 205 ; 1 Dick. 131.

(4) Cited 1 Ves. 206.

(5) Cited 1 Ves. 206.

(6) 1 Ves. 326.

stance, where a judgment had been set aside on motion, when the merits had been gone into; and refused the Motion on both points (1).

SEE, *ante*, the notes to S. C. 14 V. 580.

## DALBIAC v. DALBIAC.

[ROLLS.—1808, DEC. 2; 1809, MAY 16.]

SECURITIES obtained from a married woman, having property settled to her separate use, by a creditor of her husband, who by suppressing that fact, procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, set aside (a).

Account of separate property not farther back than the husband's death; having lived together (b).

Wife's reversion, which cannot fall into possession during the husband's life, as if it is upon his death, not assignable by him, [p. 122.]

Relief against usury upon the terms of paying what is due (c), [p. 124.]

Creditor, by suppressing his debt inducing another person to enter into a contract, not permitted to set up the debt even against the person, in whose favor and at whose instance he made the suppression (d), [p. 125.]

Married woman permitted to transact as to her separate property: but such transactions must be perfectly fair and open, [p. 125.]

IN the year 1785 a sum of 1100*l.* was invested in the purchase of 65*l.* Long Annuities, in the names of trustees; upon trust for the sole and separate use of Sarah Dalbiac, independently of the debts, control, or engagements, of her present or any future husband; and after her decease for her children by her present husband; and in case of her death without leaving any child surviving, in trust for her executors and administrators.

The executors of the surviving trustee refused to comply with the application of the Defendant Dalbiac to pay out of the trust-fund the interest of a debt, claimed by him \*against [\* 117]

(1) *Ante*, *Pickett v. Loggon*, vol. v. 702. As to an Appeal staying proceedings, see the General Order of the House of Lords, xv. 184; *The Warden and Minor Canons of St. Paul's v. Morris*, ix. 316, and the note; *Waldo v. Caley*, *Willan v. Willan*, *post*, 206, 216.

(a) A trustee cannot by the suppression of a fact, entitle himself to a benefit, to the prejudice of his *cestui que trust*. 1 Story, Eq. Jur. § 220, 243, 252, 331; 2 Madd. Ch. Pr. 97, 98.

As to the wife's power of disposition over her separate property, see *ante*, note (a) *Sperling v. Rochfort*, 8 V. 182; note (a) *Pybus v. Smith*, 1 V. 189; note (a) *Jones v. Harris*, 9 V. 428; *Socket v. Wray*, 4 Bro. C. C. (Am. ed. 1844,) 360; note (a) *Whistler v. Newman*, 4 V. 129; note (a) *Anderson v. Dawson*, 15 V. 532; 2 Kent, Com. (5th ed.) 170.

(b) See *ante*, note (a) *Milnes v. Busk*, 2 V. 488.

(c) 1 Story, Eq. Jur. § 301; 1 Fonb. Eq. b. 1. ch. 1, § 3, note (h); *Rogers v. Rathburn*, 1 Johns. Ch. 367; *Fanning v. Dunham*, 5 Johns. Ch. 142, 143, 144; *Scott v. Nesbitt*, 2 Bro. C. C. (Am. ed. 1844,) 641, note (1), 649, note (a); *Mason v. Gardner*, 4 ib. 436, 438, and notes.

(d) See *ante*, note (a) *Eastbrook v. Scott*, 3 V. 456; 1 Story, Eq. Jur. § 378, 379.

the husband of Sarah Dalbiac ; but expressed their desire to give up the trust. A Bill was accordingly filed for the appointment of new trustees ; and the usual reference being directed for that purpose, the Master by his Report approved of the Defendants, Dalbiac and Howard, as trustees ; and, that Report being confirmed, the Annuities were transferred accordingly. The husband died in 1807 ; and there was no issue.

The Bill was filed by Sarah Dalbiac against the trustees ; stating, that she had been prevailed upon by her husband and his uncle the Defendant Dalbiac, to join in a bond dated the 12th of May, 1796, for 800*l.* to the Defendant, in consideration of money advanced to her husband and interest ; that immediately upon the transfer of the Long Annuities to the Defendants she was compelled, or unduly prevailed upon, to execute a deed, declaring, that the trustees should stand possessed of the Long Annuities in trust during her life to apply them in payment of the interest of the 800*l.* bond debt to the Defendant Dalbiac, from the 25th of March preceding ; and to pay the surplus to the separate use of Sarah Dalbiac for her life ; and after her decease, by sale of a sufficient part of the fund to discharge the bond debt, and as to the residue in trust for the executors or administrators of Sarah Dalbiac. The Long Annuities were applied accordingly from the execution of that deed. The Bill charged, that the debt was advanced for the purposes of the Plaintiff's husband ; that the Defendant procured himself or consented to be a trustee with a view of repaying himself more readily out of her separate property : that he had notice of the trust ; that the Plaintiff's husband had no means of paying him ; that the Plaintiff had not any probability of deriving any fund for her support [\* 118] from her husband ; and that the Long \* Annuities are the whole of her property ; and absolutely necessary for her maintenance.

The Bill prayed, that the bond and the deed of 1796 may be declared void, as against the Plaintiff, and may be delivered up ; that the Long Annuities may be transferred to the Plaintiff ; and an account of the sums, received by the Defendant Dalbiac, and applied to his own use, since he became trustee, with interest.

The Defendant Dalbiac by his answer stated, that the advances were made principally for the purpose of enabling the husband to stock a farm, upon the joint note of him and the Plaintiff, at her request ; and it was understood that the Long Annuities should be a security for the repayment ; and the subsequent advances to them were upon the same understanding ; that in consequence of the refusal of the trustees to transfer the Long Annuities for that purpose the Bill for the appointment of new trustees was filed by agreement between the Defendant and the Plaintiff and her husband ; that the advances were for the service of the Plaintiff and her husband ; that she had signed a written declaration, upon the 5th of October, 1795, with her husband, acknowledging the receipt of the several sums, stated in the schedule to the answer, amounting to 650*l.* ; and that

they had given their joint note. The Defendant denied, that the Plaintiff was compelled or unduly prevailed upon, to sign such declaration, or the bond, or the deed of 1796 ; denying all fraud, undue means, control, false representation, &c. by the Defendant, or to his knowledge by the Plaintiff's husband ; admitting, that the Defendant consented to be a trustee with the design of repaying himself more readily or easily out of the Plaintiff's separate property ; that all the instruments were made by his Solicitor ; that the deed was not executed by Howard, the other trustee ; though he was to be \* a party ; that the Defendant knew, when he got the se- [\*119] curity, that the husband had not the means of paying him ; and believes he died insolvent.

Sir *Samuel Romilly* and Mr. *Wear*, for the Plaintiff: Sir *Arthur Piggot* and Mr. *Abercromby*, for Howard, the other Trustee.—A married woman cannot dispose of her reversionary property, not settled to her separate use ; though it is now established by decision, that she may contract debts, and make dispositions, with respect to property, so settled. Lord *Alvanley's* opinion in *Socket* v. *Wray* (1) was, that, though the wife might act upon her separate property, she could not bind her executors. Considering this transaction therefore as not to be impeached upon fraud, or as being produced by the exercise of her husband's control, the security, obtained by the Defendant, can avail him no farther than as she was entitled for her separate use: that is merely during her life ; and only to keep down the interest of the debt. Upon other grounds however this deed can have no effect. It is admitted, that the only person consulted was the very person, who ought not to have been consulted: the husband. There is no evidence ; and the result of the instruments is a contrivance, admitted, to make this property, anxiously protected from the debts of the husband, liable to those debts, by procuring the creditor to be made a trustee, through an imposition upon the Court. Under these circumstances the Defendant is bound to show, that the money was advanced for the use of the wife ; and the deed was not the effect of control. The cases of *Whistler v. Newman* (2), and *Mores v. Huish* (3), were under circumstances much more favorable: the creditor having [\* 120] advanced his money immediately on the faith of the security ; and the husband and wife having joined in executing the deed on payment of the consideration: but these advances appear by the schedule to the answer to have been made in small sums to the husband alone: the wife prevailed on afterwards to acknowledge, that the money was advanced to her and her husband ; and then the creditor became himself a trustee, with the view, as he admits, of obtaining a security. Supposing him not to have known, that this was directly in opposition to the settlement, there is no authori-

(1) 4 Bro. C. C. 483.

(2) *Ante*, vol. iv. 129.

(3) *Ante*, vol. v. 692. See as to the authority of both those cases the notes, 17, 694.



ty for establishing against the separate property of a married woman a security for a debt of her husband, contracted previously. In the late case of *Essex v. Atkins* (1) there was evidence, that the attorney consulted the wife apart from her husband; that she consented to secure the annuity of 50*l.*; as she should still have a sufficient property; enough being left for herself and the children; yet under circumstances, so materially different from these, the Court, upon the whole refusing to set aside the security, felt considerable doubt. The suit for the change of trustees is a part of the fraud: nothing being suggested, that could direct the attention of the Court to the real object. The deeds were prepared by the Solicitor of the Defendant; who conducted the suit; and there is no evidence, that the other trustee assented, or was privy, to the transaction. That suppression is alone strong evidence of fraud in this trustee; on whom that character imposed the duty of protecting his *Cestui que Trust* against engaging with a stranger in that transaction, in which he involves her with himself.

Mr. Hart and Mr. Thompson, for the Defendant Dalbiac.

[\* 121] —\* The motives to the advances made by this Defendant were humanity and kindness to his nephew and the Plaintiff; who was entitled to consider herself with respect to this annuity as a *feme sole*, according to *Hulme v. Tenant* (2) and various authorities. The joint promissory note for these sums, which, as they lived together, must have been for their joint use, has the same effect as the bond in *Hulme v. Tenant*. There is no principle for impeaching a security, taken for money, advanced *bona fide* by a trustee to his *Cestui que trust*; and this deed is impeached after an acquiescence of twelve years. There is no evidence of control by the husband: but the Defendant cannot prove the negative. The cases of *Whistler v. Newman* (3) and *Mores v. Huish* (4) are always met by a series of authorities, previous and subsequent, with which they cannot be reconciled. They are now considered as two insulated cases; and receive no attention. As to the reversion of this Long Annuity after the separate interest, a husband and wife may for valuable consideration assign her interest in a chattel, or personal property, in reversion; which was decreed here in a late case, *Carr v. Spencer* (5). The duty of the trustees was, not to assist the wife, exercising her discretion, by their judgment, but to protect her from the control of the husband, attempting by his marital right to lay his hand upon the property, or subject it to his debts. They were not therefore to prevent the exercise of her discretion for the assistance of her husband. There is no difference with reference to the consideration, as moving to her, whether the

(1) *Ante*, vol. xiv. 542.

(2) 1 Bro. C. C. 16.

(3) *Ante*, vol. iv. 129.

(4) *Ante*, vol. v. 692.

(5) At the Rolls, Easter Term, 1807.

debt of the husband was previously incurred, if *bona fide*, or by money advanced at the time. The consideration with regard to her by relieving her husband \* was the same ; per- [\* 122] haps preventing an execution ; and no other person willing to lend the money. In *Sockett v. Wray* the only absolute power of disposition was by a Will. With regard to the Defendant's character of trustee the rule, as now settled, is, that a Court of Equity will not set aside a purchase by a trustee from the *Cestui que trust*, provided there was no fraud, and the trustee had not withheld information, acquired by him in that character.

Sir *Samuel Romilly*, in reply.—As the deed of a married woman, this instrument can have no effect upon the reversion. During the coverture she can have no interest in personal property, or a chattel real, capable of assignment by her. Whatever interest she had becomes by the marriage vested in her husband. As her assignment, therefore, the deed can have no operation : neither has it any effect as the deed of the husband. It has been lately held here, that a reversionary interest, which the husband could not reduce into possession during his life, he could not assign.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—That is, if it could not fall into possession during his life ; as a reversion upon his own death (1) : not, if it depended upon an event, that might happen during his life.

*Reply*.—Another objection to this deed is, that it is usurious : the interest being secured, not from the date of the deed, but from the 25th of March preceding ; at which time the whole sum had not been advanced ; and though, it is true, a party, coming into a Court of Equity to set aside a \* deed upon the [\* 123] ground of usury, must offer to pay what is due, that is not the object of this Bill : the deed being produced by the Defendant in answer to the case, made against him as a trustee. Admitting, that a married woman may make her separate property liable for money advanced to her husband at the time, those decisions have not gone to the extent of an anterior debt. Part of these advances were made, before the Defendant was appointed trustee ; and part since. After execution of the deed, assigning the trust property to these trustees, approved by the Master, under the Decree of this Court, he cannot raise any claim upon this property. That act is an undertaking to waive any claim he might have upon it, as her separate property, under the authority of *Hulme v. Tenant* and the other cases ; and to hold it upon the original trusts, declared in 1785. It is obvious, that, if his claim had been brought forward, the Master would not have approved of him, as a trustee ; with an interest in direct opposition to his trust. The suppression of that claim, intending to insist upon it, was a fraud upon the Court. If it had appeared, in that suit, that the trustee was to pay the costs, that circumstance would have excited the suspicion of the Court.

(1) *Ante*, *Richards v. Chambers*, vol. x. 580, and the note, 588.

A trustee, purchasing from his *Cestui que trust*, has so much imposed upon him, in order to show, that he has made a fair contract as against himself, that the Lord Chancellor has said, it is difficult to conceive, that such a purchase can stand : but it never was held, that a trustee for a married woman can himself deal with her as a *feme sole* ; though she may be so considered as to other persons ; and it may be stated, generally, that a trustee for a married woman cannot purchase from her. His duty required him to protect her from the very transaction he has induced her to engage in ; to remonstrate against so improvident an act ; and to refuse, as the executors of the former trustee and the present co-trustee [\* 124] have done, to be concerned \* in it. The difficulty of getting a lien upon this property was his sole motive to become a trustee ; that he might avail himself of that situation to secure this money, from whatever motives advanced ; undertaking with the Court to be a trustee upon the trusts of the settlement ; at the same time procuring this assignment ; defeating the whole object of that undertaking ; and changing the object from the Plaintiff to himself. Her acquiescence during the coverture cannot preclude the relief.

*May 16th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The whole sum not having been advanced before the 25th of March, from which time interest was to run, the consequence is, that usurious interest was reserved upon the bond, and secured by this deed : but it would be of little importance to the Plaintiff to obtain relief only upon the terms, upon which this Court does relieve against usurious transactions (1). It is therefore more material to consider, whether upon other grounds this transaction, conducted as it has been, can stand. The Defendant by his answer avows, and it is apparent from the circumstances, that the purpose, for which he became a trustee, was to enable himself to get possession of the trust-fund, and to apply it in discharge of the interest of his debt. If that purpose had at the time been avowed to the Court, it never would have approved of him, as a proper person to be invested with that character. He was becoming ostensibly a trustee for the Plaintiff, but really for his own benefit. By the assignment, approved of by the Master, the new trustees agreed to hold upon the trusts of the original deed : viz. to pay the whole into the Plaintiff's own hands for her [\* 125] sole and \* separate use ; and yet upon the very same day a deed was executed, by which the trust, undertaken upon her behalf, was converted into an assignment for the benefit of one of the trustees ; and that behind the back of the co-trustee : who was not at all consulted in the transaction. The Defendant, procuring himself to be appointed trustee by suppressing the fact, that he was a creditor, cannot, upon principles clearly established, revert

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(1) See the distinction in bankruptcy : *Ex parte Scrivener*, 3 Ves. & Bea. 14, and the note, 15.

back to that character ; and set up again the debt, which he had suppressed.

Many cases have been determined upon that principle. This case is rather stronger than *Neville v. Wilkinson* (1) ; where the creditor, having suppressed the fact of his debt, was not permitted to set it up even against the person, in whose favor, and at whose instance he made the suppression. This Court permits married women to transact as to their separate property (2) ; but expects all such transactions to be perfectly fair and open. The Court was imposed upon in this.

If the Defendant had a fair claim, as creditor, upon this fund, he ought to have asserted that claim against the former trustees ; and then, they resisting it, the cause must have come before the Court ; and the merits of his demand would have been sifted and investigated : but by thus covertly getting the trust into his own hands he avoids all examination into the merits of his claim. It is impossible for the Court to recognize and sanction a transaction, in which the party has been guilty of an imposition upon it.

The Deed therefore can have no effect. The Long Annuity must be transferred to the Plaintiff : who is now absolutely entitled ; \*there being no children of the marriage. The [\*126] account of the by-gone dividends cannot go farther back than the death of the husband. As they lived together, she would be entitled to no account against his representative ; and therefore not against his creditor and assignee. The securities must be delivered up ; though I do not know any use, that could be made of them (3).

1. THE present interests of a *feme covert* in personal chattels may be of such a nature, and so subject to marital rights, that her husband may transfer the same, absolutely, by his assignment ; but when such interests are under the control of the Court of Chancery, the wife, even as against her husband's assignee for valuable consideration, will have an equity entitling her to some provision out of the subject assigned ; and, if the wife's interests, instead of being present, are in remainder or reversion, the husband can only assign the same *sub modo* : the assignment must be qualified by, or at any rate be subject to, a condition that the husband shall be actually living at the time when the right to possession vests ; otherwise, the wife's title by survivorship must prevail. A *feme covert* cannot, by any act or deed of her own, deprive herself of this chance ; and a court of equity will not, by taking her examination, lend itself as an instrument to enable the husband to acquire property so circumstanced : see, *ante*, notes 6, 7, 8, 9, to *Pybus v. Smith*, 1 V. 189.

2. As to the terms which, in general cases, equity imposes as the condition upon which relief is granted against usurious transactions, and the excepted case in which usurious securities are cut down altogether, see note 6 to *The Duke of Bolton v. Williams*, 2 V. 138. The Court of Common Pleas, in a case where usurious securities had been acted on, and the money partly paid by the borrower, refused to set aside a judgment and execution, unless upon terms that the defendant should repay the sums he had actually received, with legal interest : but one of the

(1) 1 Bro. C. C. 543 ; *Scott v. Scott*, 1 Cox, 366 ; *ante*, *Eastbrook v. Scott*, vol. iii. 456, and the note, 461.

(2) See the note, *ante*, vol. v. 17.

(3) *Ante*, *Parkes v. White*, vol. xi. 209 ; see 225 ; *Smith v. Lord Camelford*, ii. 698, and the note, 716, whether the account should not be given for one year.

judges (Lawrence) observed, that, if the application has been prompt, the defendant would have been entitled to set aside, unconditionally, the warrant of attorney upon which the judgment was founded: *Hindle v. O'Brien*, 1 Taunt. 414. And, in a later case, the Court of King's Bench set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal sum advanced and legal interest: the court observed, it had no authority to impose such terms in respect of an instrument of such a nature, and the case in the Common Pleas was expressly disapproved: *Roberts v. Goff*, 4 Barn. & Ald. 92.

3. That a trustee for a *feme covert* must not avail himself of that situation, to secure any personal object of his own, see note 2 to *Whistler v. Newman*, 4 V. 129; and, with respect to the length of time to which an account may be carried back, against a husband who has been in the receipt of annual income settled to his wife's separate use, see note 5 to *Smith v. Lord Camelford*, 2 V. 658.

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PITT v. WATTS.

[1808, MAY 19.]

ORDER, obtained by Plaintiff, under the usual undertaking to speed his Cause, for liberty to withdraw his Replication, and amend the Bill, discharged with Costs.

UPON the usual Motion to dismiss the Bill for want of prosecution, three Terms having elapsed, after the answer filed, without any step taken by the Plaintiff, he undertook to speed his cause; and, having filed a replication, rested for three Terms more: when upon a similar motion to dismiss he again undertook to speed the cause; and afterwards moved, and obtained an Order, for leave to withdraw his replication, and amend the Bill.

Mr. *Newland*, for the Defendant, moved to discharge that Order, as irregular.

For the Plaintiff it was contended, that the Order was regular, according to the practice; which prevailed also in the Court of Exchequer, until reformed by a General Order: but no alteration has been made in the Court of Chancery.

[\* 127] The Lord CHANCELLOR [ELDON] said, the \* Register denied the practice to be, as it was represented; and it was too absurd to be permitted (1).

The Order was discharged with Costs (2).

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SEE, *ante*, the notes to the *Anonymous case*, 2 V. 287; and it should be observed that, by the bill now (1827) before Parliament for the regulation of chancery practice, it is proposed, that no replication shall be allowed to be withdrawn for the purpose of amending the bill, except upon motion, with notice, stating the matter of the proposed amendment.

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(1) *Dean, &c. of Christ Church v. Simonds*, 2 Mer. 467; *Myers v. —*, 4 Madd. 268.

(2) See *Naylor v. Taylor*, the next case, and *Degraves v. Lane*, *ante*, vol. xv. 291.

## NAYLOR v. TAYLOR.

[1810, JUNE 8.]

ORDER to dismiss the Bill for want of prosecution after three Terms without Replication of course, without notice; and pending an Injunction, staying Execution.

THE Defendant, upon the answer coming in, obtained an Order, dissolving the Injunction; which had been extended to staying trial; continuing it as to staying execution.

Mr. *Roupell*, for the Defendant, moved to dismiss the Bill for want of prosecution, without notice, according to the practice, as lately settled (1): three Terms having elapsed without a replication.

Mr. *Heald*, for the Plaintiff contended, that this Motion could not be made pending the Injunction.

The Lord CHANCELLOR [ELDON] held the Motion regular (2).

SEE the reference given at the commencement of the last note.

## TWORT v. TWORT.

[\* 128]

[1809, MAY 19, 31.]

INJUNCTION against waste between tenants in common, on the ground, that one was occupying tenant to the other: otherwise not, except as to destruction (a). Equitable waste by cutting trees, planted for ornament, [p. 132.]

A MOTION was made for an injunction against committing waste by cutting timber and ploughing ancient meadow.

The Bill, which also prayed a partition, stated, that the Plaintiff, and his father and brother, the two Defendants John Twort the elder, and John Twort the younger, were entitled as tenants in common under a Will: the Plaintiff being tenant in fee of one fourth; and entitled to another fourth in remainder, immediately expectant on the death of his father; who was in possession of all the premises with the privity and consent of the Plaintiff and the other Defendant; as to the fourth, of which the Plaintiff was actually seised in fee, as tenant under the Plaintiff by a subsisting agreement or

(1) *Ante*, *Degraves v. Lane*, vol. xv. 291, and the note, xiv. 492. The effect of that correction of the practice, as it seems to be understood, is, that this Motion cannot be opposed: the Plaintiff therefore has not the opportunity of undertaking to speed the cause; which had been much complained of, as an instrument of delay.

(2) *Day v. Snee*, 3 Vcs. & Bea. 170.

(a) *Eden on Injunc.* (2d Am. ed.) 210-211; *Smallman v. Onions*, 3 Bro. C. C. (Am. ed. 1844,) 621; *Hawley v. Clowes*, 2 Johns. Ch. 122; *Durham R. R. Co. v. Warren*, 3 Beavan, 119; S. C. 2 Mich. H. & C. 395; 2 Story, Eq. Jur. § 916.

understanding between them ; by which the father was to pay, and from the death of the testator in October, 1806, did pay, for that fourth a yearly rent of 12*l.* 10*s.*

The Lord CHANCELLOR referred to the case of *Goodwin v. Spray* (1) ; where an Injunction against cutting timber, between tenants in common in fee, was refused by Lord Thurlow ; and said, there were subsequent cases ; taking this distinction ; that, if one tenant in common is doing merely what any other owner of land might do, the other cannot have an Injunction merely on the ground that he does not choose to do so : but if it amounts to destruction, the Court will interpose.

Mr. *Richards*, against the Motion, mentioned *Small-man v. Onlons* (2), where the \* Injunction was granted on the special ground of insolvency.

Mr. *Hart* and Mr. *Hall*, in support of the Motion, said, as to the meadow, it was clear that the Court will interfere to prevent that species of waste pending the proceeding for a partition. The other object of the motion, though more doubtful, may be sustained upon the Statutes of Gloucester (3) and of Westminster 2 (4).

The Lord CHANCELLOR [ELDON]. — My opinion at present is, that, if one tenant in common thinks proper by agreement with the other to hold the premises as an occupying tenant, the effect of that contract being to exclude the other from entry for any purpose, the tenant thereby has prohibited any act by himself but such as an occupying tenant may do. I shall therefore grant an Injunction as to the meadow land ; but not as to the other object ; unless upon looking into the authorities I can see a ground for it in the old Statutes, that have been mentioned. I think, I have refused Injunctions between tenants in common, except in special cases (5).

*May 31st.* The motion was renewed as to the timber.

Mr. *Hart* and Mr. *Hall*, in support of the Motion. — If this had been, not a mere agreement, but a lease at Common Law, [\* 130] the Plaintiff would have been entitled to the \* Writ of Estrepement ; and this Court has gone far beyond the law ; to an extent, not to be justified, if it is not to be followed up in this instance. Lord Coke (6) in his Commentary on those Statutes, giving the Writ of Estrepement in every case of waste, most ably explains the learning and the reasons of it. Those Statutes have the word "*Boscum*."

The Lord CHANCELLOR [ELDON]. — I have had occasion to express my surprise, that this Court did not formerly enjoin in the case of trespass ; where there was no intermediate protection ; as against

(1) 2 Dick. 667.

(2) 3 Bro. C. C. 620.

(3) Stat. 6 Edw. I. c. 5.

(4) Stat. 13 Edw. I. c. 22.

(5) *Hole v. Thomas*, ante, vol. vii. 589.

(6) 2 Inst. 299, 403.

waste; and therefore more reason for interfering to prevent irremediable mischief: yet Lord Thurlow long refused an Injunction against trespass; and where a mine under one field, demised to the Defendant, extended also under another field, belonging to the landlord, but not comprised in the lease, had great difficulty in granting the Injunction except as to the former; in which there was privity of estate. It appeared to me, that it should have gone to both; and, where the effect was irremediable mischief, I have ventured to do it (1): but I do not know an instance, where the Court has interfered between tenants in common.

*For the Motion.*—The case in *Moor* (2) is this precise case: one tenant in common lessee for years under the other; and it was held by Dyer and Weston, that, where there are two tenants in common, and one leased for years to the other, who commits waste, he shall be punished; and the lessor shall recover a moiety of the place \*wasted. That is a clear authority for the Writ of [\* 131] *Estrepement* and the action of waste between these parties; and this Court has a concurrent jurisdiction, by Injunction; as in many other instances of an equitable proceeding, founded in a legal right; not contravening, but in conformity to, that right; and advancing the remedy. This also is the case of landlord and tenant: the contract between them preventing an entry. There is a late instance of such an Injunction granted by the Court of Exchequer.

The Lord CHANCELLOR [ELDON].—I am much struck with the circumstance, that my experience in this Court does not furnish me with a single instance of an Injunction between tenants in common or co-parceners; and, if from that I could undertake to say, the Court has never granted an Injunction in such a case, there would be very strong negative evidence, that this Court has not thought it right to follow by analogy from time to time the Common and Statute Law upon waste, as between persons, standing in those relations. I am also positively certain, that this motion has been made, and refused occasionally; and have a strong recollection, that I have myself refused to grant an Injunction between tenants in common (3). Where a case of positive and actual destruction appeared, I granted an Injunction; as that was not the legitimate exercise of the enjoyment, arising out of the nature of the party's title to that, which belonged to him and the other party. With so much negative and positive evidence there is this farther circumstance; that applications between joint tenants and tenants in common for Injunctions against committing what would be waste between landlord and tenant are extremely rare: yet there can be no doubt, that such a case \*frequently occurs in fact; as a [\* 132] person in that relation is much more likely to take that liberty than a common tenant. Another observation is, that the

(1) See *ante*, *Mitchell v. Dors*, vol. vi. 147, and the note. *Flamang's Case*, cited vii. 308; *Courthope v. Mapplesden*, x. 290.

(2) *Moor*, 71, pl. 194.

(3) *Hole v. Thomas*, *ante*, vol. vii. 589; see the note, 590.



Court, interfering on the ground of waste, must proceed to apply the principle throughout; to grant the whole equitable relief: for instance, to prevent felling trees, planted for ornament (1). Consider the consequence of that. It would be a strong proposition, that a tree, planted for ornament, the effect depending upon the difference of taste, shall not be removed by a person, having such an interest: yet this Court, if it touches the subject, must go to that extent. I have therefore considerable difficulty in making a precedent, that is quite original.

There is in this case a specialty, upon which I prevented the Defendant from ploughing up meadow; that one of these tenants in common became the occupying tenant of the other: by that contract engaging as to one moiety to treat the land, as an occupying tenant should treat it. If the result of that voluntary obligation on his part is, that he cannot deal with his own moiety, as he might, if he had not incurred that obligation, the question is, whether he must not get rid of that relation, so voluntarily contracted, before he can exercise that original power, which he had, before he entered into that contract. On that ground I shall grant the Injunction; stating expressly in the Order, that he is occupying tenant to the Plaintiff; and restraining him from committing any waste upon the premises, which he holds as such occupying tenant. That is a safe principle; which by its necessary operation will prevent his committing any waste.

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As to the cases in which an injunction may be obtained by one tenant in common against another, see the note to *Hole v. Thomas*, 7 V. 589. And that the Court of Chancery has jurisdiction to interfere by injunction, not only in cases strictly coming under the description of *waste*, but, also, in cases of *trespass* under the color of right, where the consequences of such trespass, if allowed to go on, might be irremediable mischief, see note 3 to *The Mayor of London v. Bell*, 5 V. 129. As to the doctrine of, what is termed, equitable waste, see note 4 to *Pigott v. Bullock*, 1 V. 479.

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(1) See *The Marquis of Downshire v. Lady Sandys*, ante, vol. vi. 106, and the note, 110.

## COOK v. BROOMHEAD.

[1809, MAY 15, 19.]

Solicitor ordered to pay all the Costs, occasioned by his refusing to appear for the Defendant at the Hearing, pursuant to his undertaking, and the Costs of the application.

Motion to enlarge publication in the original Cause until Answer to the Cross Bill, the original Cause being set down for Hearing, and the Cross Bill filed after rules for passing publication, refused with Costs.

A MOTION was made by the Plaintiffs, that the Solicitors for the Defendant may be ordered to pay to the Plaintiffs the costs of the day, and also the costs of this application, for not appearing for the Defendants, when the cause was called on to be heard at the Rolls on Tuesday last; according to their undertaking in writing for that purpose.

The cause was set down to be heard at the Rolls and a subpoena to hear judgment regularly issued, returnable on the 20th of April; which subpoena was sent down; and was served personally upon the Defendant Broomhead on the 14th of April. By the practice of the Court such service was too late. Afterwards upon the Plaintiff's undertaking to appear voluntarily to a Cross Bill, filed by the Defendant Broomhead, his Solicitors gave a written undertaking to appear on his part at the hearing of the cause to hear judgment, dated the 20th of April, 1809.

When the cause was called on upon the 6th of May, the Solicitors for the Defendants refused to appear. Upon this notice of motion they offered to pay 3*l.* 6*s.* 8*d.* for the costs of the day, and the unreasonable costs of the application; which the Plaintiffs refused to take; insisting, that they were entitled to the expense they were put to in attending the hearing.

Mr. Cullen, for the Solicitors of the Defendant, insisted, that they had offered, and were still willing, to pay all, that could be required of them: viz. 3*l.* 6*s.* 8*d.* and the costs of this application, as far as they had then gone; and that they ought not now to pay any farther costs.

\* Sir Samuel Romilly and Mr. Cooke, in support of the [\* 134] Motion, insisted, that the costs required were not merely the 3*l.* 6*s.* 8*d.*; but the costs of the day, as understood by the Plaintiffs: viz. the costs they had been actually put to.

The Lord CHANCELLOR [ELDON] ordered, that the Solicitors of the Defendant should pay to the Plaintiffs the costs occasioned to them by the Defendant's not appearing at the hearing of the cause, pursuant to their undertaking, and the costs of this application (1).

May 19th. A Cross Bill having been filed, a motion was made

(1) See *Wigg v. Rook*, 6 Mod. 86, upon the authority and practice of a Court of law; and *Floyd v. Nangle*, 3 Atk. 568, as to the summary jurisdiction, exercised by the Court of Chancery over Solicitors.

at the first Seal after Easter Term by the Plaintiff in the cross cause, that publication in the original cause may be enlarged until a fortnight after answer to the Cross Bill.

The Defendant in the cross cause was not in contempt. The original Bill was filed on the 23d of April, 1807; amended by Order on the 23d of December following: the replication filed in November, 1808; and the Cross Bill was not filed, until after the rules for passing publication had issued in the original cause (1). There was no affidavit in support of the Motion.

Mr. *Cooke*, for the Plaintiff in the original cause, opposed the Motion; as perfectly irregular, under such circumstances: after the original cause set down for hearing; which would have [\* 135] been heard in the last Term; if the \* Defendant's Solicitor had not by a breach of his undertaking to appear prevented it: stating the practice as to a Cross Suit; that, if no proceeding has been taken in the original cause, publication may be stayed of course until answer to the Cross Bill: but, where a proceeding has been taken, that can be done, only, if the Defendant in the cross cause is in contempt: *Creswick v. Creswick* (2).

The Lord CHANCELLOR [ELDON] refused the Motion with costs; as against the practice (3); and no special case attempted to be made on affidavit (4).

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In *Dalton v. Carr*, 16 Ves. 93, conclusive reasons were intimated, why a motion to have a publication enlarged in an original cause, until a cross bill was answered, should not always be granted as of course; if such were the practice, a cross-bill might be filed, for the sole object of fraudulent delay, just as the plaintiff, in the original cause, was about to get his decree.

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(1) See Coop. Ch. Pl. 87.

(2) 1 Atk. 291; see also 1 Atk. 21.

(3) *Hill v. Turner*, 2 Ves. & Bea. 272.

(4) *Ante*, *Dalton v. Carr*, 93.

## BARFORD v. STREET.

[ROLLS.—1809, JUNE 6.]

DEVISE and bequest of real and personal estate in trust to pay the rents, dividends, &c. to the separate use of a married woman for life; and after her decease to convey, &c. according to her appointment by Deed or Will; with a limitation over, in case of her death in the life of the testatrix, or in default of appointment.

Absolute property: notwithstanding the indication of an intention, that the estate should remain in the trustee for her life, with powers, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest (a).

THEODOSIA SOPHIA WHITE, by her Will, dated the 8th of January, 1802, after giving some pecuniary legacies, and giving all her household furniture, jewels, and other specific articles, to Mary Barford, and in case she, the testatrix, should die, before Mary Barford should attain twenty-one, to be preserved for her use, and delivered to her at that age, gave and devised all the residue of her personal \* estate and all her real estate, to Thomas Street; [\* 136] to hold to him, his heirs, executors, &c. upon the several trusts following: that is to say, upon trust, that he, his heirs, executors, &c. do and shall pay the rents, issues, interests, dividends, and produce, thereof, as the same should be received, to Mary Barford, for and during the term of her natural life, to and for her own sole and separate use and benefit, and not to be subject or liable to the control, debts, or engagements, of any husband she might marry; declaring that the receipt or receipts of her, whether married or single, should be a good and sufficient discharge for so much of such rents, issues, &c. as should be therein acknowledged or expressed to be received: and from and immediately after her decease upon farther trust to convey, &c. the whole of the residue of the real and personal estate and effects to and among such person or persons, and in such proportions, and at such time or times, and in such manner as Mary Barford in her life-time, whether married or single, shall from time to time by any deed or deeds, writing or writings, executed by her and duly attested, or by her last Will and Testament in writing, or any writing purporting to be her last Will, signed and published by her, and duly attested, limit or appoint; and in case of her death before the testatrix, or in default of such direction, limitation, or appointment, upon trust that Street, his heirs, executors, &c. should sell the said real and personal estate; and pay and divide the money,

(a) When the wife has an absolute property in her separate estate, see *ante*, note (a) *Anderson v. Dawson*, 15 V. 532; 2 Story, Eq. Jur. § 1394.

And generally as to the wife's power of disposition over her separate estate, see *ante*, note (a) *Sperling v. Rochfort*, 8 V. 182; note (a) *Pybus v. Smith*, 1 V. 189; note (a) *Jones v. Harris*, 9 V. 428; note (a) *Whistler v. Newman*, 4 V. 129; *Sockell v. Wray*, 4 Bro. C. C. (Am. ed. 1844,) 360; 2 Kent, Com. (5th ed.) 170.

to be produced by the sale, to and among all the children of Richard Barford, her father, to be paid to them respectively on their attaining the age of twenty-one years, with survivorship; and the testatrix desired, that Mary Barford should live in her then dwelling-house in Half-Moon Street, so long as she should find it convenient to reside there; and that, when she quitted it, it should be let, and the rent applied as the residue of the personal estate was [\* 137] directed to be applied. The testatrix appointed \* Mary Barford and Thomas Street, her executors.

By a Codicil, dated the 10th of February, 1802, stating, that by her Will she had given her freehold and leasehold estates, and money in the funds, to Street, in trust to pay the rents, interest, &c. to her cousin Mary Barford for life, and that it was not her intention thereby to deprive her of the management of her said estates, the testatrix therefore desired, that Street would give letters of attorney to Mary Barford to empower her to receive such rents, interest, and dividends; and thereby also declared her intention, that Street should at the request in writing of Mary Barford, sell out any part of her money in the funds, which might be necessary for repairing and maintaining her estate in good and substantial repair; declaring her intention also, that Mary Barford should and might at any time after the decease of the testatrix name two more trustees; and that Street, his heirs, executors, &c. should convey and assign all the premises, devised to him in trust for Mary Barford, to such new trustees jointly with himself, if then living; and she directed her said trustee or trustees for the time being, on Mary Barford's attaining her age of twenty-five, upon her request in writing to sell out so much stock, as would raise the sum of 1000*l.*, and pay the same to her, to and for her own use and benefit, and to be disposed of as she should think fit.

The testator died in December, 1802, leaving Mary Barford, of the age of nineteen, and five other children of Richard Barford surviving.

The Bill was filed by Mary Barford, in February, 1808; stating, that she had duly executed a Deed Poll, dated the 22d of [\* 138] January, 1808, directing that Street should \* immediately convey, assign, &c. all the real and personal estate to the Plaintiff, her heirs, executors, &c.; and praying an account against him; and that she may be declared entitled to the real estate, and the residue of the personal estate, discharged from the trusts and limitations of the Will and Codicil, and a conveyance and assignment accordingly.

Mr. Hart and Mr. Horne, for the Plaintiff.—The Plaintiff has under this Will and Codicil the absolute interest in Equity in the real and personal estate; having an estate for life with an absolute power of appointment, in the most general terms, by Deed or Will, and not limited to any object or mode. Under the execution of that power she is entitled to call on the trustee for the legal interest. In

*Reid v. Shergold* (1), and *Bradley v. Westcott* (2), the power was to appoint by Will only, not by Deed also.

Mr. *Richards* and Mr. *Edwards*, for the Defendants, the children, entitled under the limitation over.—Upon the whole tenor and context of this Will, the Plaintiff has only an interest for life, with a power of appointment: the object being a formal settlement of all, that she was to take, whether married or sole; and the trust was to continue during her whole life. The directions are perfectly inconsistent with the notion of property; looking to the event of her marriage, and a provision for her separate use, and the future appointment of trustees; the property in the funds to be sold only for the purpose of repairs, until her age of twenty-five; and then no more \*than 1000*l.* to be raised, to be disposed of, as [\* 139] she should think fit.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—What do you contend to be the nature and extent of her interest? An estate for life with an unqualified power of appointing the inheritance comprehends every thing. What induced me at first to doubt was the indication of an intention in the Codicil, that the estate should remain in the trustee for the life of the Plaintiff, with powers to her, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think, I can by inference from thence control the clear and express words, by which the power is given to the devisee to dispose of this estate in her life-time by any deed or deeds, writing or writings, or by her last Will and Testament. How can the Court say, that it is only by Will that she can appoint? By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is, that the trustee must convey the legal fee according to the prayer of the Bill (3).

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SEE, *ante*, note 3 to *Bull v. Vardy*, 1 V. 270.

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(1) *Ante*, vol. x. 370.

(2) *Ante*, vol. xiii. 445.

(3) See the note, *ante*, vol. ii. 594.

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## PRESTON v. BARKER.

[1809, JUNE 8.]

BIDDINGS opened upon a second application by the same person; the purchaser not appearing upon notice (a).

AN estate having been sold before the Master for the sum of 1050*l.*, the Defendant Barker obtained an Order for opening the biddings on making a deposit of 300*l.* At the re-sale another person was declared the purchaser at the sum of 1335*l.* The Defendant Barker again moved to open the biddings; offering an advance of 160*l.*

Mr. *Joseph Martin*, in support of the Motion.

The Lord CHANCELLOR, remarking the bad effect of opening biddings (1), in general, from the uncertainty, attending purchasers in this Court, did not recollect an instance of complying with a second application by the same person.

Mr. *Benyon* (*Amicus Curiae*), said, Lord Kenyon had ruled, that no person, who was present at the sale, should apply.

The Lord CHANCELLOR [ELDON].—I recollect the case, to which you allude: unfortunately it was not uniformly pursued.

In this case however, notice having been given, and the purchaser not appearing to object, I shall make the Order; but it must be on the terms of paying all the Costs; as it was the fault of this Defendant himself, that he was not the purchaser.

SEE the notes to *Rigby v. M. Namara*, 6 V. 117.

[\* 141]

## BULLEN v. OVEY.

[1809, JUNE 8.]

EFFECT of an Injunction in the Court of Chancery: before Action commenced, staying all proceedings at law: after Action commenced permitting the Defendant to call for a Plea, and proceed to Judgment at Law, if in a condition to do so; or, if not, to do only what is necessary to enable him to do so; restraining Execution (b).

Therefore, after Bail excepted to, ruling the Sheriff to bring in the body a breach of the Injunction.

A MOTION was made, that the Defendant and his Solicitor may stand committed for the breach of an Injunction from all farther pro-

(a) When biddings shall be opened in the United States, see *ante*, note (a) *Anon-ymous*, 1 V. 453; note (a) *Chetham v. Grurgeon*, 5 V. 86.

(1) See the note, *ante*, vol. ii. 55.

(b) 1 Smith, Ch. Pr. (Am. ed.) 610, 611; 2 Madd. Ch. Pr. (4th Am. ed.) 220; 1 Barbour, Ch. Pr. 626, 627, 628; *Teller v. Van Deusen*, 3 Paige, 33; *Melick v. Drake*, 6 Paige, 470; *Dickey v. Craig*, 5 Paige, 283; *Boker v. Curtis*, 2 Edw. 111; *Hegeman v. Wilson*, 8 Paige, 29.

ceedings at Law ; with which the Defendant was personally served on the 1st of June.

The Affidavit stated, that a Writ of *Testatum special Capias ad Respondendum* issued out of the Court of King's Bench, against the Plaintiff at the suit of the Defendant, indorsed to hold to bail for 195*l.* 15*s.* 6*d.* ; on which Bullen was arrested on the 6th of May. The Writ being returnable on Sunday, the 7th of May, on the following day the Sheriff was ruled to return the Writ ; and a declaration was filed conditionally, until special bail should be put in ; and on the same day notice was given to the Defendant at Law. On the 15th of May notice was given, that special bail had been put in ; who were excepted to ; and notice was given, that they would justify on the 2d of June ; the first day of Trinity Term : but they did not justify ; and therefore on that day a rule was taken out upon the Sheriff for bringing in the body.

Sir Samuel Romilly and Mr. Gyffin Wilson, in support of the Motion.—There are only two authorities, relating to this point ; and neither of them stand in the way of the application : *Morrice v. Hankey* (1), and *Stone v. Tuffin* (2). In the former it was held, that there was no breach of the Injunction \* by [\* 142] proceeding, after judgment against an executor *de bonis testatoris*, by *Scire Facias* to inquire for assets : final judgment being intended. This is a direct proceeding against this Plaintiff, though apparently against the Sheriff, in violation of the Injunction in the identical action, against which it is directed ; and no extension of it is required ; as in *Stone v. Tuffin*.

Mr. Wyatt, for the Defendant.—The Defendant, proceeding to judgment, by taking out a rule to the Sheriff to bring in the body, with the view to obtain bail, has not incurred a breach of the Injunction. According to the practice of the Court of King's Bench the demand of a plea is a waiver of exceptions to bail : even if they should not be house-keepers. The Injunction is thus qualified : “but nevertheless the Defendant is to be at liberty to call for a plea, to proceed to trial, and for want of a plea to enter up judgment : but execution is hereby stayed.” He is at liberty to do any incidental act ; to entitle him to call for a plea ; and the only act he has done since the Injunction, is respecting what he had done long before it issued : ruling the Sheriff to bring in the body for the purpose of avoiding common bail. The cases in the note (3) to *Morrice v. Hankey* are strong authorities for the Defendant. The declaration in this action was delivered, before the Injunction was served ; and the judgment cannot be said to be effectual, where the bail are men of straw.

Sir Samuel Romilly, in reply.—This question depends upon the principles of the Court, and the terms of the Injunction itself ; and there \* is no authority precisely in point. Admit- [\* 143] ting, that the Defendant was at liberty to proceed to trial,

(1) 3 P. Will. 146.

(2) Amb. 32.

(3) 3 P. Will. 146.



and with that view to call for a plea, this Injunction has the effect of restraining such an act as ruling the Sheriff to bring in the body. In Injunction cases in this Court the Plaintiff at Law is always in default; though not always so in the Court of Exchequer: but in this Court, putting in the answer, he might have had a discussion upon the merits in the way most advantageous to himself. The Injunction, after an action commenced, restrains the effect of execution; not restraining the party from proceeding, if he can, to have the decision of the Court of Law: but he cannot in the mean time obtain the effect of execution; as the direct object of the Injunction is to prevent execution. If, when the Injunction is served, an action has not been brought, that is restrained. The commencement of the action is by delivering a declaration to the Defendant: but a declaration, filed conditionally, is not the commencement of an action. The Plaintiff at Law is not restrained from calling for a plea, if, having delivered his declaration, he is in a condition to do so: but the principle of the distinction in this Court (1) between staying execution only, if an action has been commenced, and restraining the Defendant from bringing an action, is, that the Court in favor of personal liberty will not permit the Plaintiff at Law, while under the imputation of laches by not putting in his answer, to take the person of his debtor immediately.

The LORD CHANCELLOR [ELDON].—I apprehend, that these words of the Injunction (now usually in English, though formerly in Latin)

[\* 144] “*Licebit autem Def. placitum ad communem legem postulare, \* et ad triationem inde procedere, et pro defectu placiti judicium intrare, executio vero vigore præsentium retardetur,*” having always been thus construed: not as giving to every man, who thinks proper to be a Plaintiff at Law, liberty to go on to demand a plea, but as having reference to a person, supposed to be in a condition to demand it; and, if the action has not been commenced, when the application for an Injunction is made, the Plaintiff at Law, notwithstanding all those words, has not a license to do any thing, that will enable him to demand a plea, and proceed to judgment. He may, if he puts in his answer in due time, so as not to be in contempt. These words have therefore the effect of restraining a person in that situation, not having commenced an action, from the legal right of arresting the Plaintiff in Equity and getting bail; and the same words must have the same construction in this case; leaving the Defendant at liberty to do no more than is necessary to enable him to call for a plea, and proceed to judgment.

The consequence of my opinion is, that a breach of the Injunction has been incurred; but by no means a contemptuous breach. The Defendant must pay the Costs of the application (2).

\* SEE the note to *Garlick v. Pearson*, 10 V. 450.

(1) See *ante*, *Garlick v. Pearson*, vol. x. 450, and the note, 452; *Nellthorpe v. Law*, xiii. 323.

(2) Injunction against farther proceeding at Law restrains taking out money, paid into the Court of Law in the Action; *Parke v. The Earl of Shrewsbury*, 13 Pri. 289.

BOURNE, *Ex parte*.

[1809, JUNE 7, 9.]

A concerted act of Bankruptcy not available, except for creditors not privy to it, The object of Lord Erskine's General Order in Bankruptcy, 29th December, 1806.

(*ante*, vol. xiii. 207,) to prevent dealing with a Docket for the purpose, not of a Commission, but of another arrangement; a practice to be discountenanced.

A Docket not to be struck without a solid ground of belief, that an act of Bankruptcy has been committed.

Commission upon a concerted act of bankruptcy may be supported by another act, [p. 148.]

Assignment of all property, though for the satisfaction of all the creditors, an act of bankruptcy, [p. 148.]

Circumstances, amounting to an act of bankruptcy by keeping house; viz. not going to his counting-house, nor into the town, near which he lived: sending for his papers to his house: not going out; except taking an evening walk in the country, [p. 149.]

THE objects of this Petition were, that a Commission of Bankruptcy may be superseded; and that another Commission may be taken out by this petitioner.

The facts, appearing upon the affidavits, were, that Parr and Norris, carrying on business in partnership in Liverpool, became embarrassed; and a separate Commission of Bankruptcy issued against Norris. The act of bankruptcy, upon which that Commission issued, was on the 15th of March, by a denial of Norris, clearly concerted (1) with the creditor, who took out the Commission, after some treaty for an arrangement; upon which a docket was struck against Norris alone on the 23d of March. On the 25th of March, a Commission was ordered at the Bankrupt Office; and upon the 28th a letter was written by the Solicitor, who struck the docket to the petitioner; communicating a circular letter to the creditors; stating, that the docket was a measure of precaution merely; to prevent a Commission by any other creditor; and to be effectual only if the proposed arrangement should not be acceded to. A docket was also struck for a joint Commission; but was abandoned: Parr not having committed an act of bankruptcy. It was represented, that another act of bankruptcy was committed on the same day by keeping house, both previous and subsequent to the denial.

Sir Samuel Romilly and Mr. Bell, in support of the Petition.—This Petition brings forward one very important question: this \*docket being struck with the very object, against which [\* 146] Lord Erskine's General Order (2) was directed: using a docket for the purpose of facilitating an arrangement of the bankrupt's affairs, and preventing any other creditor from taking out a Commission.

The second question is, whether the Commission, that has been taken out, can be supported. The objection is, that it stands on a

(1) *Ante*, *Ex parte Conway*, vol. xiii. 62; and the notes, 64; xi. 541; xiv. 602.

(2) General Order in Bankruptcy, 29th December, 1806; *ante*, vol. xiii. 207.

concerted act of bankruptcy, by denial to a creditor ; and it has been long settled, that, though a party, who entered into that conspiracy, cannot maintain a Commission upon it, another creditor, who was not privy to that transaction may ; and the bankrupt, or any other person concerned in it, cannot make the objection.

*Mr. Richards, Mr. Hart, and Mr. Cullen*, opposed the Petition ; contending, that, if the Commission could not stand upon the concerted act of bankruptcy, the ground being, that there is no delay of the creditor, who joins in the act, it could not be the foundation of another Commission, by another creditor, who was not privy to it ; and the Petition could not be sustained without stating, that there is another act of bankruptcy.

The Lord CHANCELLOR [ELDON].—With regard to the latter object of this Petition, that, the subsisting Commission being superseded, another Commission may issue at the instance of the petitioner, if I am to order that, I must inquire, what act of bankruptcy he means to proceed upon ; or I must consider, whether it is probable, that the act of bankruptcy, upon \* which this Commission is founded, though incapable of supporting this Commission, would support another Commission, taken out by persons, who are not affected by the conduct, imputed to this petitioning creditor, as connected with a concerted agreement with the bankrupt. I do not conceive, that the question will fairly arise between these parties with reference to Lord Erskine's Order ; which applies to the case of creditors contending for the Commission ; the creditor making the second application, representing, that he will take out a Commission, and has an effectual act of bankruptcy to maintain it.

The denial upon the 15th of March was clearly by concert ; with some dealing, more or less, to procure an arrangement between Norris and his creditors. The intention of Lord Erskine's Order was to prevent that sort of dealing with Commissions ; with an object in general much more culpable than in this instance. An arrangement by composition may be a very worthy object, and well intended : but, as the law stands, the act of striking a docket, and the consequences, where a commission is not taken out, or, being taken out, is not prosecuted, are so excessively serious, that, whatever may be the object, they should be very well considered. The injurious consequences, where a Commission follows, are hardly calculable ; and call for the observation, that those, who swear to their belief, that an act of bankruptcy has been committed, should be able to assign some solid reason for that belief.

[\* 148] It has been long settled, as to the objection upon a concerted act of bankruptcy, that if the party can support the Commission by another act of bankruptcy, he may. That was first settled in the case of *Mr. Brown*, agent to the Duke of Portland ; where after a verdict for the assignees, and a new trial granted by the Court of King's Bench, the concerted act of bankruptcy was given up. Upon this petition two grounds are taken : First, that, if there is nothing but a concerted act of bankruptcy, and no other can be shown,

another Commission would be equally without support. With regard to that, as upon this objection of a concerted act of bankruptcy a decision is more desirable than any reasoning, I wish to be informed, whether any authority can be produced, that a creditor, not a party to the transaction, can, or cannot make a concerted act of bankruptcy among other persons the ground of a Commission, taken out by him. I recollect cases (1), in which it was settled upon a singular ground, that an assignment of all the property is an act of bankruptcy; though the direct and immediate object is, not to delay, but to satisfy the creditors: but it was held, that a trader had not a right by deed to place his property under a distribution, different from that ordained by the Bankrupt Law; and it was carried to this extravagant length, that though the assignment was intended for the benefit of all the creditors, including that one, yet it was an act of bankruptcy.

In the case of *Bamford v. Baron* (2), in which I was Counsel, an attempt to set up such an assignment as an act of bankruptcy \* was made by a person, who was a party to the [\* 149] transaction; and the opinion of the Court was, that such person could not represent it as an act of bankruptcy; that, according to the common expression, his mouth was shut: but the understanding of the Bar was, that there was nothing to prevent another creditor, not a party to the transaction, from treating that as an act of bankruptcy: an inference favored by the expression, that the mouth of that particular creditor was shut; and I believe, many Commissions have been in fact supported upon such acts of bankruptcy by persons, not parties to them.

If that can be maintained as to an assignment, a denial by agreement between the creditor and the debtor must be considered equally liable to objection, as a concerted act of bankruptcy (3). It is clear therefore, that this Commission, standing on that concerted act, cannot be supported. I should be inclined to give to another creditor, not a party to that act, the opportunity, if he can, of sustaining it: but it is represented, that there is another act of bankruptcy; by a studious keeping house in the previous part of the same day, the 15th of March, when the concerted denial took place; the effect of which therefore is immaterial. It is not however clear upon the affidavits, that there was such a keeping house, previous to the concerted denial, as would of itself constitute an act of bankruptcy: but it is represented farther that the subsequent conduct of Norris, not going to his counting-house, sending for his papers to his own house, never going to the town of Liverpool, and not going out, \* except taking an evening walk in the country, [\* 150] is sufficient; and there is no doubt, that sort of keeping at home would be an act of bankruptcy (4); which would support

(1) *Kettle v. Hammond*, 1 Cooke's Bank. Law, 5th ed. 89: 8th ed. 106.

(2) 2 Term. Rep. 594, note.

(3) *Hooper v. Smith*, 1 Blackst. 441.

(4) The proof of delay of a creditor by denial is not necessary; see the note, ante, vol. v. 577.

another Commission. The result however may be, that his conduct in keeping at home was the concerted consequence of the former concerted act; the whole with regard to the creditor, who took out the subsisting Commission, amounting to no more than one concerted act; and I would not refuse an investigation of that before a Jury.

My opinion upon the other question makes much of what I have now said unnecessary, except for the purpose of discussing the doctrine; as, attending to the spirit of Lord Erskine's Order (1), I should not, if I had been apprised of all the circumstances, have made the Order to seal this Commission; and I think this petitioner has a better right to a Commission than the other. Admitting, that the object of settling the affairs by a composition may be very meritorious, the act of striking a Docket with the mere purpose of avoiding a Commission, may lead to so much mischief, that, though in many instances the result may be beneficial, that purpose, when it appears plainly before me, must be, as far as it can be rationally, discountenanced.

The consequence is, that the Commission must be superseded at the expense of those who took it out.

As to the extent to which all previous decisions respecting *concerted* acts of bankruptcy are qualified, at all events, by the 6th and 7th sections of the statute of 6 Geo. IV., c. 16, see, *ante*, note 6 to *Ex parte Stokes*, 7 V. 405, and see note 7 to the same case, as to the propriety of superseding any commission which appears to have been taken out with a view merely to press a private arrangement: Lord Erskine's General Order, alluded to in the principal case, is inserted in 13 Ves. 207. In what cases an assignment of his property, by a trader, amounts to an act of bankruptcy, see note 1 to *Ex parte Richardson*, 14 V. 184: the act, it seems, must have been done with an *intent* to defeat or delay some of his creditors; formerly, it would have been sufficient to show, that creditors had, in fact, been thereby delayed.

[\* 151]

BALFOUR v. WELLAND.

[ROLLS.—1809, JUNE 12, 13.]

OBJECTION to title by a purchaser under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors, and others, coming in within a limited time after the date of the deed, or disabilities removed, over-ruled upon the tenor of the deed; implying, that the receipt of the trustees should be a discharge.

The doctrine as to binding a purchaser to see to the application of the money by trustees, has been extended farther than any sound equitable principle will warrant (a), [p. 156.]

Deed construed as from the moment of execution; not by subsequent events (b), [p. 156.]

THE Bill in this cause prayed the specific performance of a contract by the Defendant to purchase a leasehold house in Wim-

(1) General Order in Bankruptcy, 29th December, 1806; *ante*, vol. xiii. 207.

(a) See *ante*, note (a) *Jenkins v. Hills*, 6 V. 646; 2 Story, Eq. Jur. § 1127.

(b) See *ante*, note (b) *Baynham v. Guy's Hospital*, 3 V. 295.

pole-Street : for which he was the highest bidder by auction, at the sum of 3460*l*. An objection to the title, on the ground, that the purchaser was bound to see to the application of the purchase-money, was taken under the following circumstances.

By indenture, dated the 19th of September, 1805, between Chase, Chinnery, M'Douall, and Watts, of Madras, of the one part, and the Plaintiffs on behalf of themselves and the other creditors of Chase and Co. who should subscribe the deed, upon the other part ; reciting, that Chase and Co. were indebted unto their several creditors, executing the said indenture, in the several debts, particularly set forth in the schedule, and there under-written ; and being desirous to pay their said creditors, as far as their stock in trade and effects would extend, had proposed to make an absolute assignment of the same unto and amongst their said creditors for and towards payment and satisfaction of their respective debts, as after mentioned, and that the said creditors agreed to take an assignment of all the stock in trade, goods, debts, and all other effects, of what nature or kind soever, in the names of the Plaintiffs, in trust as well for them as for all the other creditors, executing the deed, in full satisfaction of their respective debts ; and that Chase, in consideration of his being more particularly interested in the settlement of the affairs, should be joined in the trust, with the Plaintiffs, and be considered as invested with the same powers, as by the said indenture were vested in them, in like \*manner to all intents and [\* 152] purposes as if he had been a trustee jointly with them : Chase and Co. in pursuance of the said agreement, and for the ends, intents, and purposes, before and after mentioned, &c. bargained, sold, assigned, &c. to the Plaintiffs all the goods, stock in trade and effects, of them, Chase, Chinnery, M'Douall, and Watts, to hold to the Plaintiffs, their executors, administrators, and assigns, for ever, upon the several trusts, intents, and purposes, after mentioned : that is to say, upon trust that the Plaintiffs, &c. with the co-operation of Chase, should as soon as conveniently might be sell the assigned property for the best price, that could be got ; and with all convenient speed, as soon as sufficient funds should be realized by sale of any part of the property thereby assigned, so as to enable them to make a dividend of 5*l*. per cent. proceed to the distribution among the said several creditors ; and so proceed progressively in paying off and discharging the several debts, comprised in the said schedule, there under written, or such of them, and such other debts or demands as are thereafter particularly described as and when sufficient moneys should come to hand and be realized, to enable them, the said trustees, to make a dividend of 5*l*. per cent. or upwards ; and upon farther trust, that the Plaintiffs and Chase in the mean time and until they should be enabled to realize sufficient moneys to make such dividend as aforesaid, should from time to time and when and so often as they should be enabled to realize any part of the property thereby assigned invest the moneys arising therefrom in the purchase of Company's Paper, and cause all and every the securities to be

obtained from such moneys so to be invested to be registered in the names of the Plaintiffs or the survivors or survivor of them : nevertheless upon trust that the Plaintiffs and Chase should in the first place retain and reimburse themselves thereout all their

[\* 153] costs, charges, &c. : and for the better enabling the \* Plaintiffs to recover and receive the assigned debts, &c. Chase and Co. did thereby appoint the Plaintiffs and the survivors and survivor of them their true and lawful attorneys, &c. to sue for and recover the several debts due to Chase and Co. and to use all lawful means whatsoever in their or either of their names or otherwise for recovery of the said debts or assigned premises, and to compound or agree for the same or any part thereof ; and acquittances or other sufficient discharges for the same or any part thereof for them or either of them in their or either of their names to make, seal and deliver, and to do all and every other act or acts touching the premises, &c. ; and the Plaintiffs and Chase severally covenanted, with the other creditors, that they, the Plaintiffs and Chase and the survivor and the executors, &c. of the survivor, would from time to time, &c. use their best endeavors to recover, receive, and get in, all and every the debts, &c. or other the premises assigned, and account, for what and how much money they or either of them should have raised or received by virtue of the said indenture or otherwise by and out of the said assigned premises ; and what money or other satisfaction they or either of them should have raised and received, as aforesaid, should and would pay to the said other creditors equally with Plaintiffs according to the true intent and meaning of the said indenture ; and after paying and discharging the said debts and the expenses attending the said trusts would pay the surplus to Chase, Chinnery, M'Douall, and Watts, their executors, &c. and re-assign to them such debts or securities for money thereby assigned as should be then unreceived, or unaltered, if any.

The deed contained a provision, limiting the time for creditors to execute the deed : viz. six months for creditors in India, and eighteen months for those in Europe : creditors, who should not ex-

[\* 154] ecute within those periods \* to be totally excluded ; unless disabled by minority, &c. ; in which cases the same periods were to be allowed, respectively, after the disability ceased. It was farther provided, that it should be competent to the creditors, mentioned in the Schedule, to establish larger demands than were expressed, and to other creditors, not mentioned in the Schedule, to establish their demands, within the limited periods, and to have the same benefit, as if they had originally executed the deed, as far as the property then remaining in the hands of the trustee should extend ; but no farther ; and that it should be lawful for the Plaintiffs, their executors, &c. to arrange all claims against and in favor of the partners as well in collecting, getting in, and receiving, the debts assigned, as arranging any demands in the Schedule, or which might afterwards be made against Chase and Co. ; and to submit the same to arbitration, and to compound for debts.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiffs.—There are several cases of exception to the general rule, that the purchaser under a conveyance of real estate to trustees upon trust to sell, and pay certain scheduled debts, must look to the application of the money; and the Court has lately inclined to limit that rule. One usual instance of exception is a devise for the payment of debts, generally, and legacies: though, if it had been confined to the latter, the purchaser would be bound to see to the application, the application directed for debts, generally, discharges him from that obligation even as to legacies. This deed sufficiently shows the intention, that the trustees, not the individual creditors, were to receive the money, and give discharges for it; comprehending all creditors, who may come in within the period of six months, if in India; or eighteen \* months in Europe: with a farther extension of the time [\* 155] to those, who should be under disabilities.

Mr. *Leach* and Mr. *Spranger*, for the Defendant.—Where a trust of this nature is created for debts, generally, it is clear, that the purchaser is not bound to see to the application: as he cannot be supposed to have notice of the general debts; but, if the debts are scheduled, it is in effect a specific charge on the estate; which charge he has the means of ascertaining. The answer to the argument upon the time allowed for execution by creditors, according to their residence in India or Europe, is, that more than eighteen months, the most extended period, have elapsed, and though persons, under disability, by infancy or coverture, have still farther time allowed, the trustees are not bound to defer the application, until the disability should be removed: nor could such persons, coming in under that provision, disturb the previous application. The effect therefore is precisely the same as in the common case of scheduled debts; and in this instance the Court will not act against a purchaser upon inference; but will see clearly, that he is discharged; as the Decree would not protect him: the creditors not being parties.

Sir *Samuel Romilly*, in reply, said, that the trust could never be executed; if the receipt of the trustees is not a discharge; which is the ground of the common case.

June 13. The MASTER OF THE ROLLS [Sir W. GRANT].—There is no doubt, that the trustees can give the Defendant a complete legal title. The objection is, that, if they mis-employ the price, the purchaser may be called upon to pay the money over again: in other words, that the purchaser is bound to see to the application \* of the purchase money. I think, the doctrine upon that [\* 156] point has been carried farther than any sound equitable principle will warrant. Where the act is a breach of duty in the trustee, it is very fit, that those, who deal with him, should be affected by act, tending to defeat the trust, of which they have notice: but, where the sale is made by the trustee in performance of his duty, it seems extraordinary, that he should not be able to do what one



should think incidental to the right exercise of his power: that is, to give a valid discharge for the purchase-money.

It is not however necessary to determine that in this case, for this deed very clearly confers an immediate power of sale, for a purpose, that cannot be immediately defined: viz. to pay debts, which cannot be ascertained until a future and distant period. It is impossible to contend, that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed; and yet it could not be ascertained until the end of eighteen months, who were the persons, among whom the produce of the sale was to be distributed. If the sale might take place at a time, when the distribution could not possibly be made, it must have been intended, that the trustees should of themselves be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material, that the objects of the trust may have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed the purchasers were, or were not, liable to see to the application of the money; and their liability cannot depend upon any subsequent event (1).

[\* 157] \* There is another ground, upon which I think the purchaser must necessarily be safe, in paying the price to the trustees in this particular case. No creditors have any interest in this trust, except those, who shall have executed the deed. It is evident from the whole tenor of the deed, that they contemplated, and intended, that all the money to be produced by the sale of every part of the property should come into the hands of the trustees; should be managed by them until distribution; should be placed out in their names; and should by them be ultimately distributed. Then the trustees were as much appointed by the creditors to receive the money, as by the debtor to sell the estate. How can those creditors ever complain, that the money was paid to the very persons, appointed by them to receive it? It seems to me very clear, that the trustees were fully authorized to give a valid receipt for the purchase-money; and consequently this title is unexceptionable (2).

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SEE, *ante*, note 5 to *Omerod v. Hardman*, 5 V. 722.

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(1) *Ante*, *Baynham v. Guy's Hospital*, vol. iii. 295, 8, and the note.

(2) *Ante*, *Warneford v. Thompson*, vol. iii. 513; and the note. 515.

## PEEL v. ———.

[1809, JUNE 30.]

INJUNCTION against an Ejectment under a deed of appointment, as obtained by a husband from his wife by undue influence, oppression, &c. and an Issue directed (a).

THE Bill in this cause was filed by the heir-at-law of Mrs. R. deceased; to set aside a deed of appointment, executed by her, when in Flanders, in the year 1792, in favor of the Defendant, her husband; as obtained by undue influence, oppression and cruelty.

The Defendant by his answer admitted several of the acts of violence, charged by the Bill, among others, locking her up: pulling her down stairs: blackening her face, to make her an object of ridicule to the family; attributing his conduct to sport and levity, the effect of \* a lively disposition. He also admitted several letters, written by him to a friend, speaking of her in very harsh terms; and plainly disclosing his determination to procure the deed for the purpose of benefit to his family; and with that view to keep her abroad, in opposition to the wishes of her mother and herself for her return to England; declaring his resolution not to permit her to return: mentioning her endeavors to communicate her situation to persons, whom she met; that she required his constant watching, &c. [\*158]

A Motion was made for an Injunction to restrain the Defendant from bringing an ejectment under the deed.

Mr. Richards, Sir Samuel Romilly, and Mr. Fearnley, in support of the Motion.—The case of *Lady Strathmore v. Bowes* (1) is a precise authority for this application. The true question cannot possibly be tried in an ejectment; in which action the Plaintiff, proving the execution of the deed, would object to evidence of these facts, not applying to the time of execution; which evidence he could not be prepared to meet. The circumstances, alleged by the Bill, and admitted by the answer, are amply sufficient to excite the suspicion of a Court of Equity; and though the validity of this deed must be tried at law, when the cause comes to be heard, this Court will have that trial under its control in an issue; and will not permit such a \* question to be tried in an ejectment, with all the [\*159] disadvantage attending that mode of trial in a case of this nature.

The Lord CHANCELLOR [ELDON].—The case of *Lady Strathmore*

(a) Where a party is not a free agent, and is not equal to protecting himself, a Court of Equity will protect him. 1 Story, Eq. Jur. § 239; see *ante*, note (a) *Pickett v. Loggon*, 14 V. 215.

(1) 2 Bro. C. C. 345; *ante*, vol. i. 22. The Decree in that cause was affirmed by the House of Lords on the 19th of July, 1797; 6 Bro. P. C. 8vo. edit. 427.

There is an early precedent of a settlement, equally provident, established by a Decree of Lord Coventry in the case of *Sir Richard Greenoil v. The Earl of Suffolk*; Lord Clarendon's History, vol. iii. book 8, page 536.

v. *Bowes* is an authority for this application. The deed in that case was prepared in consequence of instructions from Lady Strathmore, given, not by letter, but by herself personally: yet this Court held, that by circumstances, which, taken altogether, would form a case of great harshness and cruelty, perhaps amounting to legal duress, perhaps not, the mind might be so subdued, that she might appear to be acting voluntarily, when she was not a free agent. It was pressed in that case, that the issue might be merely as to the circumstances of the execution: but the Court, Mr. Justice Buller, in the first instance, and Lord Thurlow afterwards, held, that the attention of the Jury should be called to the question, whether the mind was not so subdued, that, though the execution was the free act of that person, it was an act, speaking the mind, not of that person, but of another; and the case of carrying off an heiress, and afterwards seducing her, was mentioned; where on account of the first violence, what Lord Bacon calls "*prima Vis*," the subsequent consent, actually given, should not be taken as consent. That case appears to me to be a clear authority for the jurisdiction: certainly a jurisdiction of a very delicate nature; and I am unwilling to adopt the argument to the extent, to which it has been carried; that this deed might be destroyed by its own contents. That case is also an authority for the mode of trying this question; and the Plaintiff must be bound, as the Defendant will be, by the result of the trial.

An issue was accordingly directed.

SEE note 3 to *Mosely v. Virgin*, 3 V. 184.

[\* 160]

FROST v. PRESTON.

[1809, JUNE 19.]

COSTS to a pauper, whether more than out of pocket, *Quære* (a).

MR. RICHARDS and Mr. *Daniel*, for the Plaintiff, a pauper, who had obtained a Decree, applied for Costs.

Mr. *Hall*, for the Defendant, objected, that a pauper cannot have costs.

THE MASTER OF THE ROLLS said, a pauper had frequently had costs: a question sometimes being made, whether they should be *pauper* or *dives* costs (1).

Mr. *Hall* then contended, that no more could be given than the

(a) As to proceedings and costs *in forma pauperis*, see *ante*, note (b) *Whitelock v. Baker*, 13 V. 511.

(1) See *post*, *Rattray v. George*, 232, and the references; Beames on Costs, 121, 2, 3.

costs actually out of pocket; and said, in *Angell v. Smith* (1) a mistake in giving costs generally to a pauper had been so corrected.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT] refused to give any costs; observing, that the case had some difficulty; and did not call for costs.

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In *Rattray v. George*, 16 Ves. 232, it was determined to be in the discretion of the court, when it thinks fit to give any costs in a suit which has been prosecuted *in forma pauperis*, to direct the Master to tax the same either as *dives* or as *pauper* costs. For a summary of some of the general doctrines with respect to suits *in forma pauperis*, see, *ante*, the note to *Ex parte Shaw*, 2 V. 40; and the note to *Spencer v. Bryant*, 11 V. 49.

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(1) Pre. Ch. 219.

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In Easter Term 1809, 49 Geo. III. Mr. PECKWELL and Mr. FRERE were called to the Degree of Serjeant at Law.

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## 49 GEORGE III. 1809.

STEELE, *Ex parte*.

[1809, JULY 4, 9.]

Commission of Bankruptcy established under strong circumstances of suspicion: particularly, that the affidavit and bond for the Docket were written by the Bankrupt; whose brother was the petitioning creditor.

Costs to Commissioners in Bankruptcy, made parties to a Petition without sufficient ground: viz. for refusing to admit the Affidavit of an absent Creditor, proceeding at Law; not permitting the Examination of the petitioning Creditor by a person, who had not proved a debt; and admitting the full proof of a creditor, claiming a lien on papers in his hands, as agent in town for the Bankrupt, an Attorney.

Lien of the Agent in town upon the papers in his hands for what is due to him, as Agent in the Cause, from the Solicitor in the country, [p. 164.]

An attorney, not having delivered his bill according to the Statute 2 Geo. II. though he cannot bring an Action, may be the petitioning Creditor in a Commission of Bankruptcy: but his debt must be afterwards examined, [p. 166.]

THIS Petition prayed, that a Commission of Bankruptcy against John Ducas may be superseded; and that a new Commission may issue against him, directed to Commissioners at Manchester; or that the Commission may be renewed at Manchester; and in that case that the assignees may be discharged.

The circumstances upon the Petition and the affidavits were these.

The Bankrupt was an attorney at Stockport. On the 19th [\* 162] of November \* his goods being taken in execution, he prevailed on the officer to postpone the sale to the 21st, promising to pay the money on that day. He immediately went to his brother Thomas Ducas, an Attorney at Chester; who made an affidavit of debt, and executed the bond for the purpose of striking the Docket; which were both written by the bankrupt himself; and sent to London to a Solicitor, who was the agent of both of them; who, upon the 21st of November, struck a Docket, and took out the Commission, directed to Commissioners at Chester, nominated by Thomas Ducas, the petitioning creditor; and on the 30th of November, John Ducas was declared a bankrupt. On the 14th of December, at the meeting for the choice of assignees, the petitioner, a creditor for 121*l.*, attended to prove his debt: but his proof was rejected; and an affidavit, tendered by him on behalf of Wood, an absent creditor for 21*l.*, was also rejected, on the ground, that he was proceeding at Law; though the petitioner offered to guarantee, that he should relinquish that proceeding. Other debts were rejected on the same ground. Thomas Ducas acted as Solicitor to the Commission at that meeting. The petitioner, not having proved his debt, was prevented by the Commissioners from examining Thomas Ducas;

who chose himself and Clayton assignees: the agent in town of the bankrupt and his brother, being the only other person whose debt was admitted, and who voted in the choice of assignees; who in making his proof excepted among other securities, a lien upon papers in his hands. Clayton declined the office of assignee.

Mr *Hart*, in support of the Petition, contended upon the circumstances, that this was a concerted Commission; that the object of John Ducas, in quitting his house, which was the act of bankruptcy, was not, as represented, to get out of the way of attachments, but to give his \*brother the carriage of the Com- [\* 163] mission. On the other side it was insisted, that, admitting the suspicion arising from the circumstances, especially, that the bankrupt himself prepared the affidavit and bond, there was a clear, unequivocal, act of bankruptcy, without concert, by leaving his house, his goods being taken in execution, and writs out against him.

*July 9th.* The Lord CHANCELLOR [ELDON].—This Petition does not suggest any doubt, whether John Ducas had committed an act of bankruptcy: on the contrary, the prayer, that this Commission may be superseded, and that a new Commission may issue, directed to Commissioners at Manchester, or that the Commission may be renewed at Manchester, and in that case that the assignees may be removed; and the rest of the prayer in that alternative, presupposes, that an act of bankruptcy has been committed; and that the affairs of the bankrupt should be wound up under a Commission.

The circumstances, stated in this Petition, excite very high suspicion certainly: whether arising so high as to form a ground of judicial conviction is the question; the goods of the bankrupt being taken in execution on the 19th of November, he obtained the consent of the officer to postpone the sale to the 21st; promising, that he would then pay the debt; and then went from Stockport to his brother, Thomas Ducas, who lived at Chester; who, on the same day, made the usual affidavit, and executed the bond for the purpose of taking out the Commission; which were written by the bankrupt himself, and sent to a Solicitor in London, the agent of both of them. The Commissioners, who are made parties to this Petition, \*have not incurred the charges of misconduct; and as to [\* 164] error of judgment, that is a very delicate consideration generally. The first ground, taken against them, is, that they did not admit the proof of a creditor, who was suing at Law (1); with this circumstance, that this petitioner, who attended on behalf of that creditor, with the affidavits of his debt, offered to guarantee, that he should relinquish the action: but the Commissioners could not act upon that assurance. The next imputation on the Commissioners is, that they refused to permit this petitioner to examine Thomas Ducas, the petitioning creditor, under the Commission. They were

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(1) Stat. 49 Geo. III. c. 121, s. 14.

also right in that. Acting under the Commission they must conceive it to be valid : and they properly refused to permit a person, who had not proved, and did not appear before them in a capacity to prove, a debt, to enter into that examination. The next article, in which their judgment is impeached, involved a question of considerable difficulty. The agent in town, proving his debt, excepts among other securities, upon which there is no doubt, papers, which he held as agent to the bankrupt ; and I do not recollect an instance of this question arising in bankruptcy. It is determined (1), that the agent in town has a right to intervene with his claim of lien, not as against the client directly, but as against the Solicitor, employed by him ; giving to the agent a right in Equity to the money due, before the papers are taken from him ; and therefore that money shall be paid to him to the extent of his lien against the Solicitor. It is therefore possible, that the agent may receive a considerable payment in part of his debt ; to the extent in which the lien may be established ; but the question was, how the proof was to be moulded. It is sufficient, that the point has never been determined ; and I cannot [\* 165] impute to the Commissioners, that, under the circumstances, in which that proof was offered, they admitted proof of the whole. The conclusion is, that the Commissioners are made parties without a sufficient ground ; and they must have the costs, if they think proper to receive them.

The next consideration is, whether this Commission is to be superseded ; which must be maintained upon the objection, that this Commission, at the instance of this petitioning creditor, is not the Commission, under which the affairs of the bankrupt ought to be administered ; admitting that an act of bankruptcy had been committed, and that the affairs ought to be arranged under some Commission. I do not recollect a case of greater suspicion than the circumstances, disclosed by these affidavits, create : the bankrupt going to the house of his brother, an attorney ; that brother, as the petitioning creditor, taking out the Commission ; and the bond and affidavit being in the hand-writing of the bankrupt ; who was also an attorney : the brother acting as Solicitor to the Commission ; and becoming one of the assignees ; constituting in his own person every character, important in the administration of bankruptcy. The question must however be determined, upon, not the suspicion, or the delicacy, but the truth of the transaction. If this was proved to be the bankrupt's Commission, upon all principle and the habitual course in bankruptcy, it could not stand. The result of the affidavits is, that Thomas Ducas had determined to take out a Commission ; that this is his process ; and not that of the bankrupt. The circumstance that these instruments, the affidavit and bond, are in his hand-writing, certainly excite strong suspicion : but the affidavit represents, that Thomas Ducas had gone out ; intending, that his

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(1) *Ward v. Hepple, ante*, vol. xv, 297.

clerk should do this business ; but found, that his brother had done it ; and was imprudent enough to send it to town. Under such circumstances, \* naturally promoting anxious inquiry, [\* 166] he cannot complain, that the transaction is sifted to the bottom.

Another objection is, that Thomas Ducas acted as Solicitor to the Commission. It would have been better, if he had not : but that is no ground for superseding the Commission ; and the same observation applies to his choosing himself assignee under such circumstances : but if upon all the circumstances, taken together, this is an adverse Commission, a question to be examined with great jealousy, I have no authority to supersede it.

The other points, if this Commission stands, are the subject of arrangement ; as the objection, that there has not been sufficient examination as to the debt of Thomas Ducas ; consisting partly of money advanced, partly of business done, as an attorney ; who, though he cannot bring an action without delivering his bill (1), may take out a Commission of Bankruptcy (2) : but the Bill must be afterwards examined. There must be a meeting for the choice of assignees ; who appear not to have been regularly chosen ; and one declines. The rest of the Petition must be dismissed, but without Costs, except to the Commissioners ; as, though I think this Commission should be supported, yet having regard to all the circumstances, and the apparent complexion of the whole transaction, I cannot impute any blame to those, who have called for an examination, whether this proceeding was really adverse, or not.

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1. As to the *lien* which a town agent has, for expenses incurred by him, and his own proper charges, in the prosecution of a suit in which he has been employed as agent, see, *ante*, note 7 to *Taylor v. Popham*, 13 V. 59.

2. The doctrine formerly held as to concerted commissions of bankruptcy is materially modified, but perhaps not entirely done away with, by the recent consolidated bankrupt act : see note 6 to *Ex parte Stokes*, 7 V. 405.

3. That an attorney may take out a commission of bankruptcy, founded on his demands for professional business, before he has delivered his bill according to the statute of Geo. II., see the note *Ex parte Sutton*, 11 V. 163.

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(1) Stat. 2 Geo. II. c. 23, s. 22.

(2) *Ante*, vol. xv. 489 ; *Ex parte Sutton*, xi. 163 ; see the note, 165.



## DE BATHE v. LORD FINGAL.

[ROLLS.—1809, JULY 5.]

APPOINTMENT of guardian by an unattested Will made good by a codicil, with three Witnesses, on the same paper, referring to the Will, as annexed, making some alterations as to legacies, and confirming it in all other respects; as in the case of a devise of land (a).

UPON a Petition, presented in this cause, the question was, whether there was a legal appointment of guardians to the infant Plaintiffs by the Will of Sir James De Bathe; who by his Will expressly appointed Lord Fingal, Mr. Cruise, and another gentleman, since deceased, to be guardians: but the Will was attested by only one witness. By a Codicil, written on the same sheet of paper, the testator expressed himself in the following manner:

“I do hereby make and declare this to be a Codicil to my Will hereunto annexed; in which said Will I am disposed to make some alterations.”

He then made some alterations as to legacies; and concluded thus:

“And in all other respects confirm my said Will hereunto annexed.”

The Codicil was attested by three witnesses.

Sir *Samuel Romilly* and Mr. *Phillimore*, for the infant Plaintiffs, said, it was very material, that the guardians should be legally appointed; as their consent to marriage was required.

Mr. *Alexander*, for the surviving Guardians, said, this appointment was clearly sufficient: the effect of the codicil, on the same sheet of paper with the Will, expressly referring to it, [\* 168] as annexed, and confirming it in all respects, \* except as to the alteration of some legacies, being a re-execution and re-publication; as it would be in the case of a devise of land: there being no difference in this respect between the two Statutes (1).

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] held clearly, that the appointment of guardians was good: the Codicil, attested by three witnesses, adopting the Will; and amounting to a re-execution and re-publication: and a devise of land by the Will would have been made good by the Codicil.

SEE the notes to *Pigott v. Waller*, 7 V. 98.

(a) A codicil duly executed will operate as a republication of the will to which it refers, whether the codicil be or be not annexed to the will, or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will, whether it be described in such codicil or not. See *ante*, note (a) *Pigott v. Waller*, 7 V. 98, for a full collection of the authorities illustrating this subject.

(1) Stat. 12 Ch. II. c. 24; Stat. 29 Ch. II. c. 3; see *Pigott v. Waller*, *ante*, vol. vii. 98; and the note, 105.

## HALLIFAX v. WILSON.

[ROLLS.—1809, JULY 6, 7].

Trust by Will, subject to an interest for life, to pay and transfer to the Testator's nephew and nieces, equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable; and a limitation over, in case all should die, &c.

Vested interest at the age of twenty-one, before the death of the tenant for life (a). Trust to pay the dividends of Stock to the testatrix's niece for life; and after her death to divide the capital among the brother and sisters of the testatrix, and in like manner to the survivors or survivor of them; the shares of those who died in the life of the niece, passed to their representatives (b), [p. 171.]

WILLIAM HODGSON by his Will, dated the 21st of April, 1796, gave to his friends Thomas and Joseph Wilson all his estate and effects of what nature or kind soever or wheresoever, which he should die possessed of or entitled unto, to hold unto them, their heirs, executors, administrators, and assigns, upon trust that they should with all convenient speed collect the debts due to him; and, after paying his just debts and funeral expenses, and the legacies, hereinafter mentioned, which he directed to be in the first place paid and satisfied, that they should lay out and invest the clear surplus of the money so to be collected in and upon real securities in the public funds; in trust to pay the interest, dividends, and proceeds \* thereof unto his mother Rebecca Hodgson during [\*169] her life; and from and immediately after the death of his said mother in trust to pay and transfer the said trust moneys unto and among his nephew and nieces, Barbara, Thomas, and Margaret, Hodgson, share and share alike: the respective shares of his said nephew and nieces with all accumulating interest thereof, if any, to be paid or transferred to them respectively at their respective ages of twenty-one years; and in case any of his said nephew and nieces should happen to die, before his or their share or shares respectively of in and to the said trust moneys and trust premises should become payable, then he directed that the share or shares of him her or them so dying should go or be paid to the survivors or survivor in equal shares and proportions; and if but one survivor then to such only survivor as and to be paid at such times and in such manner as their original shares respectively of or in the said trust moneys were so directed to be paid, as aforesaid; and in case of the death of all his said nephew and nieces before the said trust moneys should become payable by virtue of his said Will, then he gave and be-

(a) See *ante*, note (a) *Willis v. Willis*, 3 V. 51; note (a) *Legh v. Haverfield*, 5 V. 452; *Woodcock v. Dorset*, 3 Bro. C. C. (Am. ed. 1844), 569-571, notes and cases cited.

As to the leaning of Courts in favor of vested interests in cases of doubt, see *Olney v. Hull*, 21 Pick. 311, 414; *Dingley v. Dingley*, 5 Mass. 535; *Bowers v. Porter*, 4 Pick. 198; *Shattuck v. Stedman*, 2 Pick. 468, 469.

(b) See *Drayton v. Drayton*, 1 Dessaus. 324; *Campbell v. Heron*, Cam. & Norw. 296.

queathed the said trust moneys and trust premises to the said Thomas and Joseph Wilson, their heirs, executors, &c. share and share alike; and appointed them joint executors.

The testator died soon afterwards. Joseph Wilson died after the death of the testator. Thomas Hodgson, the testator's nephew, died on the 9th of December, 1807, in the life-time of the testator's mother; and having attained the age of twenty-one. Margaret Hodgson married; and died under the age of twenty-one. Rebecca Hodgson, the testator's mother, died in 1807. Barbara Hallifax, late Hodgson, attained the age of twenty-one in 1800; and the Bill was filed by her and her husband; praying a transfer and payment.

[\* 170] \*The Defendant, the administratrix of Thomas Hodgson, claimed his share, as a vested interest in him at the age of twenty-one.

Sir *Samuel Romilly* and Mr. *Wetherell*, for the Plaintiffs, contended, that the construction, adopted in the cases, *Emperor v. Rolfe* (1), and *Cholmondeley v. Meyrick* (2) followed by the late cases, *Hope v. Lord Clifden* (3), and *Shenck v. Leigh* (4), upon a limitation over in case of death, before a portion shall become payable, as not preventing the interest from vesting, is confined to portions, strictly speaking, by deed; and has not been extended to a Will; that construction depending upon circumstances, not applicable to a Will; as the parental obligation to provide for children. In a Will the word must have its usual signification.

Mr. *Richards* and Mr. *Daniel*, for the Defendant, insisted, that the construction of the word "payable," established by those authorities, must prevail in every case of a provision by way of portion, in whatever manner: the limitation as to the time of payment applying to the circumstances of the fund, not to the capacity of the person to take the portion.

*July 7th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The only question in this cause is, what is the event, upon which the shares of the nephew and nieces are to go over: whether only the death of either of them under the age of twenty-one; or their deaths either under that age, or before that of the testator's mother:

in other words, whether, in order to acquire a vested interest, [\* 171] \*it was necessary, that a nephew or niece should both survive the testator's mother, and attain the age of twenty-one. If no bequest over had been introduced, they would have clear vested interests at the age of twenty-one; whether they survived the testator's mother, or not. The whole residue is given to trustees, upon trust to pay the interest to the testator's mother during

(1) 1 Ves. 208.

(2) 3 Bro. C. C. 253, n.

(3) *Ante*, vol. vi. 499.

(4) *Ante*, vol. ix. 300; *Powis v. Burdett*, *King v. Hake*, 428, 438; *Willis v. Willis*, iii. 51; and the note, 55.

her life; and after her death to divide the principal among the nephew and nieces of the testator, share and share alike. Upon the authority of a great number of cases that would be in the nature of a vested remainder after an estate for life. In the case of *Roebuck v. Dean* (1), where the trust was to pay the dividends of stock to the testatrix's niece for life, and after her death to divide the capital among the brother and sisters of the testatrix; and in like manner to the survivors or survivor of them, it was held, that, notwithstanding the last words, the shares of those, who died in the life of the niece, passed to their representatives.

The bequest in this case being absolute in the first instance, and not depending upon the contingency of surviving the testator's mother, the question is, whether it is qualified by the subsequent words; and made to depend upon that contingency. The introduction of a period of payment, by itself, would have had no effect upon the right. A trust being already declared for the benefit of the nephew and nieces, those additional words would only postpone the payment: but then the testator does not mean, that any nephew or niece, who should die under the age of twenty-one, should take a vested interest; and my opinion is, that all he intended by the subsequent words was to give to those, who should attain the age of twenty-one, the shares of those, who should die under that age. He has however used the word "*payable*;" a word of ambiguous [\* 172] import: in one sense, and with reference to the capacity of the persons to take, he had just before declared, that the age of twenty-one was the period, at which their shares were to be payable: in another sense, with reference to the interest of the tenant for life, they could not be payable until her death: but then it is with the direction to pay at the age of twenty-one that the bequest over is immediately connected; and it is to that period of payment, as it seems to me, that the subsequent words are most naturally to be referred. The declaration, that the shares should be paid at the age of twenty-one, naturally led the testator to consider, what was to become of the shares of those, who should not live to attain that age; and then he adds the direction, that the shares should go over. I think, is is no strain to understand him as adverting merely to the age of twenty-one, which he had just before appointed as the period of payment.

For this construction it does not appear to me to be necessary to resort to the authority of the cases, that have been alluded to in the argument; though unquestionably the reasoning, upon which those cases proceed, must be just as applicable to Wills as to Settlements: supposing the object to be similar. Here the object was not strictly to make a provision for children: but the testator, not having any of his own, destines the whole of his fortune to his nephew and nieces; and it is ultimately given over to persons, who are not related to him. However in the cases referred to the diffi-

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(1) *Ante*, vol. ii. 265; 4 Bro. C. C. 403.

culty did not merely consist in finding a restricted meaning for the word "payable," though it was necessary in most of them so to do, but in getting the better of other words; which seemed almost expressly to postpone the vesting until after the death of the parent.

Whereas here the whole turns upon the meaning of the [\* 173] word "payable" \*There is no other difficulty: that word is determined in almost all those cases to be capable of a double construction; and the construction, which I am inclined to put upon it, is that, which seems to me to be most consistent with the testator's intention.

The Plaintiffs therefore have no claim to the share of Thomas Hodgson; as he attained the age of twenty-one (1).

1. THAT, except in cases where a special intent is discoverable (as it was held to be in the principal case), the period to which survivorship must be referred is the period of division, see, *ante*, note 3 to *Hill v. Chapman*, 1 V. 405. But where there is no bequest over, a gift *after the death* of a particular person is held not to denote a condition that the legatee shall survive such person, but only to mark the time at which the legacy shall take effect in possession: see note 3 to *Mahm v. Keighley*, 2 V. 333.

2. In the case of *Bayard v. Smith*, 14 Ves. 476, where a testator had bequeathed property to be divided amongst his grandchildren in equal shares (but subject to an ultimate contingent limitation over), to be paid to the males when they should reach the age of twenty-one years, and to the females at that age, or at the time of their marriage, with a clause of survivorship in case any of his said legatees should die before his, her, or their share or shares *became payable*, it was held, that the interest of one of the children, who died after he had attained the age of twenty-one, vested in his representative, and that all claims of survivorship were excluded, although the ultimate contingency (by which it was contended, the absolute vesting was prevented) was not determined. The testator, it was observed by the court, might, consistently, fix upon one contingency on which survivorship was to depend, and another and a different one on which the general limitation over was to take effect. Of course, however, the operation of a bequest of this nature may be controlled by the context of the will in which it is found, and effect given to the intention of the testator when that can be clearly collected: *Beauman v. Stock*, 2 Ball & Beat. 413, and see note 4 to *Blake v. Bunbury*, 1 V. 194.

(1) This Decree was affirmed by the Lord Chancellor, on Appeal, 6th March, 1812.

## ONSLOW v. ———.

[1809, JULY 1.]

**INJUNCTION** to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c. except according to the custom of the country (*a*).

THE Defendant, a tenant from year to year, having received notice to quit, a motion was made for an Injunction to restrain him from taking away the crops, manure, &c. contrary to the usual course of husbandry, and from cutting and damaging the hedge-rows, &c.

Sir *Samuel Romilly*, in support of the Motion, said, that upon the affidavits the Defendant was making use of the remainder of his time to do irreparable mischief; admitting that there was no case of this sort upon a tenancy from year to year.

THE LORD CHANCELLOR [ELDON].—The principle applies equally to the case of a tenancy from year to year as to a lease for a longer term. The Judges have uniformly said in modern times, that a tenant from year to year must treat the farm in a husband-like manner according to the custom of the country; and this Court must give its aid equally in that case; with the qualification, that he  
 \* is not to remove any thing except according to the cus- [\* 174]  
 tom of the country (1).

The Order was made accordingly.

SEE, *ante*, the notes to *Pulteney v. Shelton*, 5 V. 147.

(*a*) 1 Story, Eq. Jur. § 913. So an injunction may be obtained against a lessee to prevent him from making material alterations in a dwelling-house; as by changing it into a shop or ware-house. *Douglass v. Wiggins*, 1 Johns. Ch. 435.

(1) See, *ante*, *Pulteney v. Shelton*, vol. v. 147, 260, and the note; *Lord Grey de Wilton v. Saxon*, vi. 106; *Ward v. Duke of Buckingham*, cited x. 161; *Lathropp v. Marsh*, v. 259, was the case of a tenant from year to year.

## BURGES v. LAMB.

[1809, JULY 11, 12, 15, 18.]

RESIDUE bequeathed in trust to be laid out in real estates, to be settled to the same uses as estates devised to the trustees for life successively without impeachment of waste: with various limitations in strict settlement: all the estates for life being without impeachment of waste; and the ultimate remainder in fee. The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole.

As to the consequence, whether, if the trustees are not by their character prevented from taking any benefit, the tenant for life may have any, and what proportion, of the timber, and how the excess is to be disposed of, *Quære*.

Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental: namely, an extensive wood (a).

Cutting timber, where necessary for the growth of underwood, not waste, [p. 179.]

Land devised to be sold, the money to be laid out in other estates, to be settled: the rents and profits until sale to go to the persons, entitled to the estates, to be purchased. Tenant for life without impeachment of waste cannot cut timber on the estate to be sold, [p. 180.]

Right of tenant for life without impeachment of waste to cut timber generally, in a husband-like manner, independent of the effect upon the beauty of the place, except equitable waste (b), [p. 185.]

Equitable waste not to be extended, [p. 185.]

JOHN LAMB, by his Will, dated the 19th of June, 1794, devised and bequeathed several estates, particularly described, and all other his freehold and copyhold estates whatsoever and where-  
[\* 175] soever, to the use of the \* Defendant Thomas Henry Lamb, for and during the term of his natural life, without impeachment of or for any manner of waste; with remainder to trustees to preserve contingent remainders: remainder to the first and other sons of Thomas Henry Lamb, successively in tail male: provided he should marry Frances Sawyer, and such sons should be of such marriage; but not otherwise: remainder to the Defendant Sir James Bland Burges, for his life, without impeachment of or for any manner of waste: remainder to trustees to preserve contingent remainders: remainder to his eldest son Charles Montolieu Burges for life, in the same manner: remainder to his first and other sons in tail male; with various remainders over to several persons in strict settlement; and the ultimate limitation to — Wray.

The Will then, giving the usual powers of leasing to the tenants for life, and directing them to take his name, &c. and giving some annuities and legacies, &c. gave all the residue of his personal estate to the Defendants Thomas Henry Lamb, and Sir James Bland Bur-

(a) Equitable waste is defined to be such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a Court of Equity, are so esteemed, from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. 2 Story, Eq. Jur. § 915, 919.

(b) As to the effect of the clause without impeachment of waste, see *ante*, note (a) *Pigot v. Bullock*, 1 V. 479; 4 Kent, Com. 78.

ges, upon trust that they should, as conveniently might be after the testator's decease, lay out and invest the same in the purchase of freehold or copyhold estates of inheritance in the kingdom of England, and of leasehold estates of long terms, that might lie contiguous to and be useful and necessary to go with the purchase of any freehold or copyhold estate ; and should settle the same to, for, and upon, the several uses, intents, and purposes, and under and subject to the same provisions and limitations as the testator's manor of Ixworth Thorpe, and other his estates, devised therewith, were devised ; and in the mean time and until the said residue should be laid out in such purchases, should permit, suffer and empower, the person, who for the time being should be in possession of his said manor and other estates by virtue of the limitations \* in his [\* 176] Will, to receive and take for his own use and benefit the dividends, interest, and produce, of the said residue, in case the same should be laid out within two years next after his death, in the same manner as if it had been laid out in the purchase of freehold and copyhold estates ; but, in case the same should not be laid out within two years next after his death, he directed, that the dividends, interest, and produce, of such part of the said residue as should not then be laid out, should from the end of such two years accumulate and make part of the said residue : and be laid out and invested in such purchases, as aforesaid. The testator appointed the Defendants Sir James Bland Burges, and Thomas Henry Lamb, his executors.

The testator died on the 20th of February, 1798. In June 1797 Frances Sawyer married George Smith.

The residue of the testator's personal estate being very considerable, about 70,000*l.*, the executors contracted for the purchase of an estate at Foxton, in the county of Leicester, at the price of 45,000*l.* ; which purchase was completed in June 1800. In March 1803 they contracted for the purchase of the estate and mansion house of Beauport, with the manor of Oare, in the county of Sussex, at the price of 21,500*l.*, including the timber, which was valued at 1603*l.* None of the tenants for life after Sir James Bland Burges had issue.

The Bill was filed by the eldest son of Sir James Bland Burges ; charging the executors with a breach of trust in purchasing an estate with timber upon it ; stating that the Defendant Lamb had cut timber, which was ornamental ; and the beauty of the place would be much affected by cutting it ; and praying an Account and Injunction.

\* Several of the other tenants for life, who had been [\* 177] originally Plaintiffs, were struck out ; and made Defendants. An Injunction having issued, upon affidavits, restraining the Defendant Lamb from cutting timber, generally, a Motion was made upon his answer to dissolve it. Sir James Bland Burges took a lease of the estate at Beauport, for ninety-nine years, if he should so long live, with an exception of the timber ; and a reservation to Lamb of the right to enter and cut ; but the Bill charged, that the Defendant



Lamb agreed not to cut except for repairs, and decaying timber. The answer denied that agreement; insisting also, that the Defendant cut no ornamental trees; nor any thing except such as tenant for life without impeachment of waste may cut: viz. decaying trees, and such as hindered the growth, &c.

Mr. *Alexander*, Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, for the Defendant Lamb, in support of the Motion to dissolve the Injunction.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Wetherell*, and Mr. *Wingfield*, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—This case brings forward in the shape of a Motion a question almost new, untouched by any decision, very little affected by *Dicta*, and of as much importance and difficulty as any that I have ever been called upon to consider. If this estate, purchased since the death of the testator, had been the subject of an actual devise with these limitations, the tenant for life without impeachment of waste would have an absolute power over the timber; except as it could be controlled by the interposition of this Court; restraining such an exercise of the legal right [\* 178] as upon its very peculiar doctrine with \*reference to the principle of equitable waste is not permitted.

The testator has given the residue of his personal estate to two trustees, Thomas Henry Lamb, the first tenant for life of the real estates, and Sir James Bland Burges, the second tenant for life; upon trust to lay it out in estates of inheritance, to be settled to the same uses; and if that is to be understood, with the same incidents and powers, it imposed upon them the trust, holding an even hand as between themselves and those in remainder, to create the same limitations to Lamb for life, without impeachment of waste; with all the contingent remainders, to be preserved by estates in trustees; and therefore to be attended to by the Court; with many vested remainders to the several tenants for life; and the ultimate remainder to Wray; who has the present estate of inheritance; and the Court is bound to suppose, that no other person may ever have it; so much so, that it would be difficult to maintain, that a Decree, binding him, would not bind tenants of the inheritance, who may hereafter come into existence.

Admitting, that the purchase of an estate, covered with timber, gives a great advantage to the tenant for life without impeachment of waste, so a tenant for life, subject to waste, may derive great advantage from the nature of the estate; if, for instance, a considerable part of it is covered with underwood, to be cut at the end of twelve years. Assuming, that in laying out the residue of the fund, beyond the amount of the Leicestershire purchase, in the Beauport estate, there is too large a quantity of timber, accessible to the tenant for life, one question has been raised, whether, recollecting, that another subject of purchase is the Leicestershire estate [\* 179] on which there is no timber, a purchase, \*which must be admitted to have been duly made, with reference to all the

interest, there is too much timber considering the two purchases together as an entire administration of the whole trust. It is very difficult to maintain that: yet under an inquiry, whether the Beauport estate was properly purchased, the Master's attention would be applied to that estate alone; as the purchase with that money, which the Court had then to dispose of.

Taking the fact to be, that timber, of the value of 1600*l.*, capable of being felled, has been acquired by Lamb, conceiving himself to be entitled to cut, it is clear, that, whatever may be the state of circumstances between him and Sir James Bland Burges, and whatever their agreement, they could not affect the equitable right of this Plaintiff against either of them. The ground, upon which the Injunction was granted, clearly is not waste in ornamental timber: nor is the language such as the Court adopts in those cases: but I granted the Injunction according to the exigency, arising out of the particular circumstances; the estate represented to be full of ornamental timber, in some sense of the word: the value of the timber, 1600*l.*: a great part capable of being cut; and to the amount of nearly 800*l.* actually cut immediately: the Defendant therefore bringing back into his own pocket that sum: a large quantity of underwood also upon the estate; which is to be considered with regard, not only to its own value, but also to the timber growing among it; and with reference to that Lord Hardwicke's opinion in *Knight v. Duplessis* (1); is material; that it is not waste to cut timber, where necessary for the growth of the underwood, in which it is situated. It was farther represented, that an agreement had taken place between these \*trustees; which, as matter of fact, bore [\*180] directly upon the Equity in this cause; that the tenant for life should exercise his right only for repairs, or upon decayed timber: and Sir James Bland Burges took a lease from Lamb, excepting all timber trees; with the right to enter and cut; and a covenant by Burges, that he will cut the underwood at seasonable times to the intent, that Lamb might enter and cut the trees: that instrument dated in July, after a considerable quantity of timber had been cut.

Admitting then, that, if this estate had been actually devised in this way, the tenant for life would have all power over the timber, which in Law belongs to his estate, and in Equity also, except such as this Court by a due application of the principle of equitable waste denies to a tenant for life unimpeachable for waste, the question remains, whether this is a due execution of the trust by laying out the money so that under the limitations to themselves for life without impeachment of waste, one of them may immediately draw back into his own pocket 1600*l.* of the trust-money. In a Court of Equity the mind is rather startled at that proposition. There is very little of decision or *dictum* upon it. In Lord *Archer's Case* (2) land was to be converted into money, to be added to other money,

(1) 2 Ves. 361.

(2) *Lady Plymouth v. Lady Archer*, 1 Bro. C. C. 159; *Wolf v. Hill*, 2 Swanst. 149.

and the whole to be laid out in other land. Lord Archer thought, he was entitled to cut timber upon the land to be sold; but Lord Thurlow held the contrary; though the instrument contained an express declaration, that the rents and profits of the estate, until sold, should go to the persons, who would be entitled to the lands to [\* 181] be purchased; which was held to mean \* the annual rents and profits. That turned upon this; that, as Lord Archer was to be tenant for life without impeachment of waste of the estate to be purchased, if he might commit waste upon the other estate, before it was sold, he would have the benefit of double waste.

I cannot deny Lord Thurlow's opinion in that case, that a purchase might be made of an estate, in which the tenant for life, without impeachment of waste, would have the right, to some extent, of cutting timber; and the only rule left by that case is, that the purchase is to be such as the trustees in a just and sound exercise of their discretion could make: but, if under that act the tenant for life acquired the right to cut some timber, that mere circumstance would not make it an abuse of their trust, or a mistaken exercise of their discretion. Lord Clarendon's Case is, I think, of another sort: viz. an exchange: which is very easily managed with reference to this; comparing the interests in the two estates: but it is otherwise as to personal property, to be laid out in real estates.

The present subject of consideration is, what the Court is to do upon this broad fact; and how if this is an undue execution of the trust, it is to be set right. Can the principle be, that the wood upon the land to be purchased is to be considered as settled estate? That cannot be; as upon the principle, that this sum ought not to be laid out in wood, as the tenant for life, not restrained, may destroy it, the converse is equally true; that it cannot remain wood, if he is restrained from taking any part; and all these other tenants for life may urge, that, if they are to be restrained from cutting, that money ought to be laid out in something, from the produce of which they could derive benefit. It cannot be maintained, that they [\* 182] are \* to have no benefit, being restrained from cutting, though, if the fund had been laid out in land, they would be entitled to the rents and profits. Then, as to the consequence, is the excess of wood, if any, beyond the proportion of the tenant for life, to be sold? I believe, the precedents are so; and, the consequence would be, that if the injunction is granted upon that ground, to that extent only, setting that right, the tenant for life would be entitled as to all the rest; unless some equity can be raised upon consideration of the beauty or the nature of this estate, preventing the exercise of his legal powers: otherwise, if this estate is such in its nature as the testator has directed, or this Court would direct to be purchased, the tenant for life without impeachment of waste must have the right to exercise his legal powers, so far as they are not controlled upon equitable doctrine.

If a stronger principle than that is to be applied, what is the intermediate step, short of selling the estate? Orders to cut decaying

timber, the produce to be enjoyed during the life of the tenant for life by him, the capital to go after his death to those, entitled to the inheritance, are but of modern origin, by the application of equitable doctrine in cases, where there was no question, whether the estate had been properly purchased, or whether the doctrine might be properly applied. This case has another distinction. The principle upon which the power of cutting is denied to the first tenant for life, requires the Court equally to deny it to every other tenant for life. Refusing to permit Lamb to cut one stick of timber, I must extend that refusal to all the others; as if the full interest in the timber cannot properly be given to one tenant for life, though the opportunity for a subsequent tenant for life to take it does not occur so soon, it is impossible to ascertain how \* soon, or to [\* 183] what amount, he may derive undue advantage.

The question upon the principle as to ornamental timber, in the extent, to which it has been pushed in this argument, appears to be new; that by building a house near a wood the wood is devoted to the protection of that principle of equity; and so, the effect of making walks through a wood, is, that no part of that wood is to come down. The Court has not gone farther than protecting what is planted or growing for ornament (1); and has frequently refused to act upon affidavits, stating merely, that the timber is ornamental. Upon this subject I have anxiously guarded my expression against the inference, that all the trees, which are ornamental, were within the principle. In the instance of a park, once full of wood, if timber had been felled, leaving vistas and rows, and some scattered trees, it would be difficult to say, the Court would protect the former, and not the latter.

Upon these affidavits it is difficult to apply that equitable doctrine. At least the timber must be described, not as ornamental merely, but as planted and growing for ornament. Let this Motion be mentioned again at the next Seal; and the other Defendants must have distinct notice of it.

*July 15th.* The Motion was renewed; and after another argument stood for Judgment.

*July 18th.* \*The Lord CHANCELLOR [ELDON].—The [\* 184] question upon this Motion is, whether the Injunction was properly granted at the time; and, if not, whether upon subsequent circumstances it can now be sustained. My own opinion is confirmed by the little I have met with upon this very intricate subject: the two cases before Lord Clarendon and Lord Thurlow: the latter proceeding upon a reason, which has a direct application to this case. If this was an improper purchase as to the first tenant for life, it is equally improper in principle, though different in degree,

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(1) See *The Marchioness of Downshire v. Lady Sandys*, ante, vol. vi. 107; and the note, 110.

as to every future tenant for life ; and farther, if the strict equity is to prevail, that timber ought not to be comprised in this purchase, or that this is to be treated as ornamental timber, the subject of injunction upon that principle, every future tenant for life has an interest in a degree to say, that this is not the species of purchase, in which the money, with reference to his interest, ought to be laid out.

The affidavit of the Plaintiff does not suggest, that this was not a proper purchase. Admitting the representation of the Bill, that the timber, which has been cut, is ornamental timber, and that the beauty of this place will be much affected by cutting, I should not be authorized to grant the Injunction upon the ground of any proof before me by these affidavits, that any timber was planted or growing for ornament. The Injunction granted does not aim at that ; not merely preventing the Defendant Lamb from cutting timber, planted or growing for ornament, according to the usual terms of those injunctions, but taking the axe out of his hands altogether ; restraining him from cutting any thing. Under the alleged agreement that

he would cut only for repairs, I granted the Injunction in [\* 185] the broad terms, in which it is expressed, \* upon the supposition, that, standing that agreement, he had nothing to ask. It is necessary to remark, that the state of the record has been since materially varied. All the Plaintiffs, except Montolieu Burges, are now Defendants : he remains the sole Plaintiff. The question therefore is, whether the Injunction can be maintained upon the present state of the Record, not as it originally stood : or whether it is to be varied ; and to what extent : or whether, instead of upholding this Injunction, granted under circumstances so different, with qualifications and conditions, in this very special case the application for a very special Injunction should not be the subject of another motion.

The Plaintiff must contend, that this timber ought not to have been purchased, either as to the whole, or at least to some extent ; and then the effect in equity of that proposition must be considered ; as, admitting it to be a due purchase, I must attend to the legal and equitable rights of a tenant for life, unimpeachable for waste ; who is at liberty to cut timber, generally, treating it in a husband-like manner, independent of the effect upon the beauty of the place ; provided the exercise of that liberty cannot be checked by a due application of the principles, upon which in the contemplation of this Court that is waste, which is not acknowledged as such at Law. Then, still regarding this as a proper purchase, is this timber planted or growing for ornament ; or serving as shade or shelter according to the meaning of our Injunctions ? The application of that principle to a wood, covering thirty acres, is carrying it to an extent, of which I do not recollect an instance ; and I cannot admit, that it is wiser to extend, than to confine, these Injunctions : on the contrary, if it was to be considered as *res integra*, the wisest course would be to require grantors and testators to say, what their own Injunc-

tions should be; rather than leave them at liberty to give legal rights: this Court being called on to determine, how the parties, having those legal rights, may be said to execute them equitably. Without saying, that there is no timber in these woods or walks, that may not be protected by the application of these equitable principles; I do not find the fact so made out, that I can maintain the Injunction upon that ground.

If the case is to take the shape, that this sum of 1600*l.*, or rather (that being vastly beyond what can be stated in Equity as the subject of complaint) a less sum, not easily ascertained, ought not to have been so laid out in execution of a trust of this residue for the benefit of the persons, entitled successively under this Will, the Bill must be framed in another manner; and directed against all, who are innocently involved in the breach of trust, acting with advice; treating them all as equally involved in it; and the relief must be against all. This Bill not leading to a proper decision in a case of great novelty, and difficulty, and involving much inquiry, if the motion is to stand upon that ground, the Bill should first be set right: but farther, unless in given cases, it is very difficult to maintain, if the principle is, that the timber ought not to have been bought, that it ought to be preserved: the proposition being, that it is not land, or estate of inheritance, that ought to have been purchased; as there cannot be among all the parties that equal, just, enjoyment which they ought to have by a due investment of the fund in mere landed property. It is obvious, that Lamb, the first tenant for life, entering into the agreement, that is suggested, did not act according to his strict duty: and Sir James Bland Burges, being upon the same ground under the same obligation, and the Plaintiff upon this Bill, must submit to the same restraint. That is by no means all; as these three tenants for \* life may be all dead in the [\* 187] course of ten years; and then the fourth tenant for life may contend, that, if this fund is improperly laid out, it is an injury to him, that he finds the estate such as it is; and that timber, which it is said he cannot cut, ought to be all arable land.

The principle of such a Bill is therefore driven to this: that, when the proportion, that such a tenant for life is to have, can be ascertained, all the excess beyond that ought to be removed from the estate; and laid out in that species of subject, that ought to be purchased, not hereafter, but now; as the increase hereafter will give the tenant for life the proper subject and value, when his estate comes into possession; not leaving him open to the variation of the price of timber and other accidents. In the present state of the Record therefore this Injunction is not to be maintained. Another object also deserves attention. The Court, taking care, that the fund shall be laid out, as Lord Thurlow says, according to a reasonable and sound execution of the trust, must not on the other hand place trustees in such difficulties, that they never can execute a trust of this sort without coming to a Court of Equity. Here are several tenants for life unimpeachable for waste; and it is very difficult to

hit the ratio: but, if the timber bears a very considerable proportion to the value of the whole purchase, the tenant for life, especially as he is one of the trustees, cannot possibly be permitted to take it. The Court may be driven to take this course; that trustees, laying out the fund in a timbered estate, without applying that reasonable and discreet attention, that in a fair view ought to be applied to the interests of all parties, should be considered in a Court of Equity as not buying any timber for their own benefit. That is a mode of cutting the knot, which perhaps in a new and difficult case might be adopted: but, without determining, what might be the decision \* upon such a case, my opinion is, that upon this Bill the Injunction cannot be maintained.

WITH respect to the general question, as to the right of a devisee having only a particular limited interest in the land devised to cut down timber growing thereon, and as to the property in such timber if wrongfully cut, see, *ante*, note 2, 3, to *Lee v. Alston*, 1 V. 78; notes 3, 4, 5, 6, to *Pigot v. Bullock*, 1 V. 479; and the note to *Williams v. Williams*, 15 V. 419. In note 4 to *Pigot v. Bullock*, *ubi supra*, the doctrine of what is termed equitable waste is also adverted to.

## WRIGHT v. WRIGHT.

[ROLLS.—1809, JULY 19.]

DEVISE of real estate in trust to sell; if a conversion to personal property, not absolutely, but for partial purposes, as the payment of debts, a resulting trust as to the surplus for the heir; but as personal property (a).

SAMUEL WRIGHT by his Will, dated the 1st of January, 1790, and properly attested to pass land, according to the statute (1), left unto his two nephews John Wright and Ichabod Wright, the whole of his real estates whatsoever, to them, their heirs, executors, administrators, and assigns, for ever; in trust for them to sell and dispose of the same; in order to the payment and discharge of all his just debts, “&c.” (that is to say) his house, messuages, farms, and lands, laying at Carlton in the county of York; specifying also some other places; and any other lands and estates; and he directed, that the receipt of his said nephews for the purchase-moneys should be a sufficient discharge. Likewise all his property of what nature or kind soever he gave and bequeathed to his said two nephews

(a) If land is directed to be sold for specific purposes, and they fail, it will go to the heir as real estate. Or if after such purposes are accomplished, a surplus remains undisposed of, the heir will be entitled to it. *North v. Valk*, C. W. Dud. Eq. 212; *Bogert v. Hertell*, 4 Hill, 492; *Marsh v. Wheeler*, 2 Edw. 156; 2 Story, Eq. Jur. § 793.

As to Equitable Conversion, note (a) *Wheldale v. Partridge*, 5 V. 397; note (b) *Brown v. Bigg*, 7 V. 279 b; note (a) *Shedden v. Goodrich*, 8 V. 481 b; note (c) *Ripley v. Waterworth*, 7 V. 425.

(1) Stat. 29 Ch. II. c. 3.

John Wright and Ichabod Wright and their heirs for ever, in trust to dispose of as follows:—To his dear wife he gave upon his decease 100*l.* with such of his plate, linen, and furniture, as she should choose, not exceeding 400*l.* The Will then proceeds in the following manner:

“After the sale of my estates and other of my effects the rest, residue and remainder, except such legacies and other specific sums as I shall by a Codicil leave I hereby direct the same to be invested in the hands of the aforesaid John Wright and Ichabod Wright, \*in such securities as they think proper; and the [\* 189] interest and benefit as shall arise and accrue therefrom to be paid to my wife half-yearly or as they think proper a sum not exceeding 100*l.* per annum for and during the term of her natural life in case after all my debts and funeral charges, &c. are paid, there shall be so much; and the remainder over and above the said 100*l.* per annum I will be carried on for the benefit of my daughter and any such children I have at the time of my decease, or born in due time after, to each share and share alike at the age of twenty-one or day of marriage with consent; and upon the decease of my wife all the property from whence the 100*l.* arises to be divided as aforesaid among my children as that other part is on the age of twenty-one or day of marriage with consent of trustees and my wife whom I hereby appoint guardian for the persons of any children I shall have. Whereas prior to my marriage I by deed settled to pay my wife an annual sum in case she survived me in lieu of any claim she might otherwise make, this my Will amply provides for that. Should it please God that the only daughter I now have living should die and that I have no child living at the decease of my wife my will is that for and during the time of her natural life she my wife shall receive the income of the whole of my fortune so remaining and at her decease the same shall go as by a Codicil wrote with my own hand shall direct. I hereby appoint my said two nephews John Wright and Ichabod Wright executors to this my Will and residuary legatees for such purpose as this my Will directs. Notwithstanding what I have left to my wife as my widow yet I hereby direct that in case she shall marry again from that time she shall not from such marriage receive any more from my fortune than the 100*l.* per annum; and I beg each of my executors will accept \*of twenty guineas for a ring and my thanks, that [\* 190] will take upon them the trust by this my Will.”

The testator died in December, 1803; not having made any Codicil; leaving his widow, and the daughter, mentioned in the Will, his only child, surviving. The daughter afterwards died unmarried, intestate, and under the age of twenty-one. The Bill was filed by the testator's widow; and the question, made at the Bar, was, whether the real estate was converted into personalty absolutely; upon which construction the Plaintiff claimed the whole residue, as administratrix and sole next of kin of her daughter; or whether the conversion was limited to the payment of the debts, &c.; subject to which, and the



interest of the Plaintiff for her life, the produce of the real estate would belong to the Defendant, the son of the testator's deceased eldest brother, as heir at law.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiff, contended, that this, as in *Fletcher v. Ashburner* (1), was a conversion out and out; not for the mere purpose of paying the debts; in which case according to *Ackroyd v. Smithson* (2) the surplus beyond the amount of the charge would belong by way of resulting trust to the heir; who however takes it as personal property.

Mr. *Richards* and Mr. *Maddock*, for the Defendant, the son of the testator's deceased elder brother, claiming as heir at law either of the testator, or his daughter, argued, that the inference from [\* 191] \* the whole Will was against the conversion of the real estate into personal for all purposes; that the single object was the payment of debts; and it could not have been considered personal property in the event of the deaths of his wife and daughter during his life; merely that it should go to his next of kin.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question is, whether the produce of the sale of the lands is in the events, that have happened, to be considered as real or as personal estate. If nothing more was meant than to make a provision for the debts, all, beyond what was required for that purpose, would remain real estate; and as such would go to the heir. If the intention was to convert it into personal property for all the purposes of the Will, though some of those purposes should fail, and though in consequence of that failure part might result to the heir, yet it would result to him as personal estate, and be so considered in a question between his representatives.

In the first instance the testator appears to have had nothing more in view than to make a provision for the discharge of his "just debts, &c.;" which "&c." may include funeral expenses and legacies; but in the subsequent direction he blends the produce of the real and personal estates, and makes them a joint fund; which he disposes of together, and without any distinction. The first disposition, after the 100l. and the specific articles to his wife, is, after the sale of his estates and other of his effects, the rest, residue, and remainder, (that is, which shall be constituted after and by means of the sale of all his estate and effects) is to be invested and placed out in such securities as his executors shall think proper. What is to become of [\* 192] it, when so placed out? The first \* object is the payment of an annuity to his wife for her life, "in case after all my debts and funeral charges &c. are paid there shall be so much." What he had made applicable to the payment of his debts, &c. was the whole of his property real and personal. He meant the annuity to be a charge on the same fund, if enough were left to answer it.

Then "the remainder" beyond the 100l. annuity is to be carried

(1) 1 Bro. C. C. 497. See, *ante*, *Gibbs v. Ougier*, vol. xii. 413; *Berry v. Usher*, *Wilson v. Major*, xi. 87, 205; *Williams v. Coade*, x. 500; and the notes, i. 45, 204.

(2) 1 Bro. C. C. 503.

on for the benefit of his daughter, and such children as he may have, share and share alike at the age of twenty-one or marriage.

Here is a disposition of every thing, except the 100*l.* per annum, allowed to the widow. He then proceeds to dispose of that: directing upon the decease of his wife all the property, from whence the 100*l.* arises, to be divided among his children at the age of twenty-one or marriage.

There he conceives himself, as I apprehend, to have made a complete disposition of the whole of his fortune, comprehending the produce of his real estate. Every thing was to go to his children during his wife's life, except the 100*l.* per annum: but then it occurred to him, that his children might not arrive at the age of twenty-one, or be married; and that they might all die during the life of his wife; and he thinks it right to enlarge her income in that event; and what he then gives her is, "the income of all his fortune;" that fortune being composed in the manner already stated. Then, not meaning to give his wife in that event the absolute property, he reserves to himself the power to dispose of the capital by a Codicil: but he never made one; and the question is, to whom the produce of the real estate now belongs. It seems to me, that he had converted that \*estate into money, either absolutely and to all intents [\* 193] and purposes, or at least for the purpose of being applied and distributed in the manner, directed by his Will; and of abiding such ulterior disposition as in case of the failure of children he should think proper to make of it. It is not necessary in this case to determine, whether the conversion be absolute or qualified; because in the events, that have happened, the result with respect to the rights of the parties will be the same. In the one way the mother and daughter would take it, as personal property, distributable as upon an intestacy with respect to the capital; and the mother, as administratrix to her daughter, would now be entitled to her share: in the other the daughter would, as heir at law, take it by way of resulting trust upon a failure of the object, for which the conversion was made: but according to Lord Thurlow's doctrine (1), referred to in the argument, it would be personal estate in her; and the mother, as her administratrix, would in that way also be now entitled to the whole.

The Decree accordingly declared the Plaintiff entitled to the whole produce of the real and personal estate.

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See, *ante*, notes 2, 3, 4, to *Kidney v. Coussmaker*, 1 V. 436.

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(1) *Hewitt v. Wright*, 1 Bro. C. C. 86; *Smith v. Claxton*, 4 Madd. 484.

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TAITT, *Ex parte*.

[1809, JULY 24.]

JOINT creditors admitted to prove under a separate Commission of Bankruptcy for the purpose of assenting to, or dissenting from, the Certificate: not to receive dividends with the separate creditors.

Separate Commission of Bankruptcy by a joint creditor, [p. 195.]

THE Petition stated, that a Commission of Bankruptcy issued on the 16th of June, 1809, against Phillip Norris, carrying on  
[\* 194] trade in partnership with Thomas Parr, \* as iron merchants in Liverpool; that the petitioners believe the separate estate of the bankrupt to be very inconsiderable, and the separate debts, owing by him at the time of his bankruptcy, also to be inconsiderable; that the joint debts and the joint estate were very considerable; that the bankrupt was jointly with his partner indebted to the petitioners in the sum of 4300*l.* and upwards; and prayed that they and the other joint creditors may be at liberty to prove their debts under the Commission; that distinct accounts of the separate estate of the bankrupt, and of the joint estate of him and Parr, may be kept; and that the said estates may be divided as under joint commissions: the petitioners undertaking to pay the separate creditors of Norris twenty shillings in the pound on account of their several debts.

Sir Samuel Romilly and Mr. Cooke, in support of the Petition: Mr. Hart and Mr. Bell, against it. The Petition stood for Judgment.

The Lord CHANCELLOR [ELDON].—This Petition, by joint creditors, to be admitted to prove their debts under a separate Commission, and that the estate may be divided as under a joint Commission, undertaking to pay the separate creditors twenty shillings in the pound, not praying, that the joint creditors may be at liberty to vote in the choice of assignees, is founded upon *Ex parte* Chandler  
[\* 195] (1), and the other late cases. Upon looking at the

(1) *Ante*, vol. ix. 35; *Ex parte Hall*, 349; *Ex parte Kensington*, *Ex parte Ackerman*, xiv. 447, 604; *Ex parte Sadler and Jackson*, xv. 52; and the references in the note, iii. 243, *Ex parte Ellon*. The conclusion is, that joint creditors may prove under a separate Commission for the purpose of assenting to, or dissenting from, the Certificate; and of going against the surplus, if any, after satisfaction of the separate debts: not to vote in the choice of assignees, or receive dividends with the separate creditors; except a joint creditor, who is the petitioning creditor under the Commission; or, where there are no joint effects, and no solvent partner; alleged insolvency, without bankruptcy, not being sufficient: *Ex parte Jan-son*, 3 Madd. 229; or no separate debts: or the joint creditors will pay the separate creditors twenty shillings in the pound; or where the separate debts are not of an amount sufficient for voting in the choice of assignees; or are overbalanced by the debt of the petitioning creditor, a joint creditor, consenting. *Ex parte Jones*, *Ex parte Taylor*, *post*, xviii. 283, 4. No costs given on the Order for joint creditors to prove under a separate Commission: *Ex parte Bradshaw*, 1 Glyn & Jam. 90. By Stat. 6 Geo. IV. c. 16, s. 62, in all Commissions against one or more partners (see s. 16) any creditor, to whom the bankrupt or bankrupts is or

Report of *Ex parte Chandler* it does not amount to an authority, which can be applied to this petition. In that instance the Commission was taken out by a joint creditor (1); who gave his assent to the Petition; the fact was ascertained, that there was only one separate creditor, for 30*L.*; and it was proposed by paying off that creditor to displace him from that situation; which reduced the case to this; that there was no separate debt; and therefore no creditors, except that one, who took out the Commission, and assented to the prayer of the petition, and other joint creditors. In a subsequent case, *Ex parte Hubbard* (2), the amount of the joint debts was represented to be 78,000*L.*; the joint effects 32,000*L.*; and the separate debts 2000*L.*; and Lord Erskine appeared to be inclined to follow what I had done: but the joint creditors refused to pay the separate debts.

The Petition, now before me, goes to this: that, not knowing, what the separate property, and the separate creditors, may be, I am to make the same Order, that I made in *Ex parte Chandler*; where the petitioning creditor consented to the petition; and, the only separate creditor was paid his whole debt. As it is uncertain, what may be the amount of the joint and separate debts, the ordinary rule as to the choice of assignees must take place: [\*196] viz. they must be chosen by those creditors, who are entitled to prove without an Order.

As to that, which is prayed by this Petition, that the joint creditors may be admitted to prove for the purpose of receiving dividends, the rule, adopted by Lord Hardwicke, was, that the joint creditors should be permitted to prove for the purpose only of assenting to, or dissenting from, the certificate, and going upon the surplus, if any, after satisfaction of the separate creditors: but, if they wished to have a distribution of the joint estate, they should be put to file a Bill, and wind up the whole: the proportion belonging to the bankrupt being part of his separate estate. That was followed without interruption for half a century; until it was disturbed by Lord Thurlow; who held it wrong in point of law; and, having considered it with great anxiety, his Lordship allowed joint creditors to prove under a separate Commission, and to take dividends; stating, that all the partners were jointly indebted; and the joint creditor, suing both, might take either a joint execution, or a separate execution against each; and it was the business of the assignees to file a Bill against the other partners to liquidate the account between them and the

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are indebted jointly with the other partner or partners or any of them, shall be entitled to prove for the purpose only of voting in the choice of Assignees, and assenting to, or dissenting from, the Certificate: but not to receive a dividend out of the separate estate, until all the separate creditors shall have received the full amount of their respective debts: unless such creditor shall be a petitioning creditor in a Commission against one member of a firm.

(1) *Ex parte Ackerman*, ante, vol. xiv. 604.

(2) *Ante*, vol. xiii. 424.

bankrupt. Lord Rosslyn afterwards restored the old rule (1); but with this peculiarity, permitting the joint creditors to prove, if there were no joint effects; and stating, that the account of the joint estate should be taken in the bankruptcy. That is right; if you can insure, that the account will be properly taken in the absence of the other partner: but the difficulty is, that the account must be taken in his absence; and I repeatedly pressed that to Lord Rosslyn; who answered, that, if the partner chose to come in, to [\* 197] \* see the account taken, he might: if not, it was his own fault; and the creditors should not be farther embarrassed; and Lord Rosslyn repeatedly made the Order for keeping distinct accounts, and distributing the joint estate among the joint creditors and the separate estate among the separate creditors. There is infinite difficulty upon that: but, as I have before observed, it is much better to attend to established practice, though it may be involved with some difficulty, than to have a new rule with every change of the Great Seal.

The petitioners therefore may prove for the purpose of assenting to, or dissenting from, the Certificate; but I cannot go farther upon the offer to pay the separate debts, until I know, what they are.

SEE the note to *Ex parte Ellon*, 3 V. 238, and the note to *Ex parte Kensington*, 14 V. 447.

## SLATTER v. NOTON.

[ROLLS.—1809, JULY 20, 26.]

REQUEST of leasehold premises, “and all my estate term and interest therein.”

The interest, acquired under a subsequent renewal of the lease, does not pass (a).

Distinction between bequests of leasehold estate by words in the present and in the future tense, as confined to the existing, or comprehending a future, interest, [p. 199.]

ELIZABETH IMBER by a Codicil, dated the 20th of May, 1794, made the following disposition:

“Also I give and leave to the said Stephen Street my leasehold garden in Southgate Street Winchester and the stable adjoining my dwelling-house in St. Thomas Street for the term of his life and after his decease to all and every his children if he should have any but if he should die without issue then I give the said garden and stable and all my estate term and interest therein to the said Elizabeth Street and Jane Street their executors and administrators.”

(1) *Ante*, *Ex parte Ellon*, vol. iii. 238; and the note, 243; *Ex parte Abell*, iv. 837; *Ex parte Clay*, vi. 813; 1 Cooke, B. L. 233, 8th edit. by Mr. Roots, 258, &c.

(a) It will be observed, (*post*, p. 199,) that the question in the present case was treated by Sir William Grant as one of intention.

Another part of the same Codicil was thus expressed :

"Also I give and bequeath to Mrs. Mary Imber daughter of the Reverend John Imber deceased to live in my dwelling-house in the parish of St. Thomas aforesaid rent-free and I hereby bequeath to her the use and occupation of it accordingly during the term of her natural life and from and after her decease I give and bequeath my said dwelling-house with its appurtenances unto Stephen Street for his life and after his decease to all and every his children if he should have any but if he should die without issue then I give my said dwelling-house and all my estate term and interest therein unto the said Elizabeth Street and Jane Street their executors administrators and assigns."

The testatrix then gave and bequeathed all the rest, residue, and remainder of her goods, chattels, plate, china, linen, money in the funds, and other personal estate, to the said Elizabeth Street and the Plaintiff; they paying an annuity of 30*l.*, given by the will to Mary Imber for her life; and appointed executors.

On the 26th of December, 1803, after the publication of her Will and Codicils, the testatrix surrendered the lease of the said house and premises, twenty-six years of the term being then unexpired, to the Corporation of Winchester; and by indentures of that date the Corporation granted a new lease to the testatrix for the term of forty years. The testatrix died on the 29th of June, 1805. The Bill, filed by one of the residuary legatees, against the executors, and against Elizabeth Street and Edward Hearne and Jane, his wife, formerly Jane Street, prayed the usual accounts; and that it may be declared, that the bequest of the second Codicil and the leasehold premises are redeemed or revoked.

\* Mr. Hart and Mr. Wyatt, for the Plaintiff.

[\* 199]

*July 26th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question in this case is, whether a specific devise of leasehold estate is effected by a renewal of the lease, subsequent to the Will. The ground, upon which in many cases, it has been held, that renewed leases did not pass to the specific devisee, is, that the thing given no longer exists: but, as a testator may undoubtedly dispose of the future, as well as his present, interest in a chattel real, it is a question of intention, what the subject of disposition is; whether only the interest, which he had at the time of executing the Will: or all the interest, though subsequently acquired, which he might have at his death in the leasehold premises: that intention is to be collected from the words, used by the testator, to express it.

In the case of *Abney v. Miller* (1) Lord Hardwicke lays down this rule: where a testator expresses himself in the present tense, it must relate to what is in being at the time of making the Will; and can mean only the first lease, and the term to come in it; and afterwards (2)

(1) 2 Atk. 593.

(2) 2 Atk. 599.

says, persons who are acquainted with the proper method of conveying these estates by Will, give in this manner: "all my estate, right and interest, I shall have to come in this lease at the time of my death."

The words "*in this lease*" are probably inaccurate. The question would arise, what is *this lease*? the present or any subsequent, lease? But I cite those passages \* to show the distinction, taken by Lord Hardwicke, between bequests by words in the present, and in the future, tense,

How is the disposition made in this case? The testatrix first gives to Stephen Street her leasehold garden, and the stable, adjoining her dwelling-house, for his life; and after his decease to his children: but, if he should die without issue, then she gives the said garden and stable, and all her estate, term and interest therein to the Defendants, their executors and administrators. She afterwards with regard to her dwelling-house bequeaths it to Mary Imber for life, and after her decease to Street for his life; with remainder to his children; but, if he should die without issue, she gave her said dwelling-house and all her estate, term and interest therein to Elizabeth and Jane Street, their executors, administrators, and assigns.

In what did her estate, term, and interest in the dwelling-house, &c. at that time consist? In the residue of the lease, which she then had of these premises. There are no words, prospective, or future, to take in any interest, which she might subsequently acquire in them. In the case of *James v. Dean* (1) I thought, even the words of futurity, which there occurred, were to be restrained to such interest as the testator should at the time of his death have to come in the then existing lease. Upon the Appeal the Lord Chancellor was of a different opinion; and, if the words of this Will were the same as those, I should certainly have acquiesced in that opinion. But here are no words of futurity: nor any of the collateral circumstances, which in that instance \* were relied upon, as evidence of an intention to pass any renewed lease.

I think, it will be found, that the case of *Carte v. Carte* (2), is the only one, in which the renewed lease was held to pass without any words, directly applicable to a future interest; and that case is very distinguishable from the present. Lord Hardwicke lays considerable stress upon the nature of the subject of disposition: the trust of a term: not a legal interest; and says, that distinguishes it from the cases decided. Next, the words in that Will were conceived to be sufficient to take in all the advantages and benefits, belonging to the trust. One of those advantages and benefits was that of the renewal; and the devisee could hardly be said to have all the advantages, arising and accruing from the former lease, unless he had the advantage of substituting the renewed lease in its place: but here all the words, "estate, term, and interest," are completely satisfied by the then existing interest; and they are all words of

(1) *Ante*, vol. xi. 383.

(2) 1 Atk. 174; Amb. 8.

strictly legal import; and applied to a legal subject. It is true, in *Carte v. Carte* Lord Hardwicke is made to say (1) of *Abney v. Miller*, "If in the case of *Abney v. Miller* the testator had said, *I give all the interest I have in the lease*, there is no doubt that it would have passed:" but that must be inaccurate. It is hardly possible, that Lord Hardwicke should have so expressed himself in contradiction to two passages in his own judgment: one, where he states the effect of words in the present tense; and the other, pointing out the proper mode of disposition to affect a future interest; where he says (2) "Persons who are acquainted with the proper method of conveying these estates by Will, give in this \*manner: [\*202] *all my estate, right, and interest:*" not stopping there; as if that was enough, but adding, "*I shall have to come in this lease at the time of my death;*" and in the subsequent case of *Rudstone v. Anderson* (3) the words "all my tithes at Westow," and "all my lease or interest in that lease at Westow," appeared to Sir John Strange to import precisely the same thing.

This case therefore is not governed by *Carte v. Carte* or *James v. Dean*. The consequence is, that the specific devisee does not take the house and garden: but they pass by the residuary bequest to the Plaintiff Slatter, and the Defendant Street.

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SEE the note to *James v. Dean*, 11 V. 383.

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(1) 3 Atk. 176.

(2) 2 Atk. 599.

(3) 2 Ves. 418.

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## ANGELL v. HADDEN.

[ROLLS.—1809, JULY 7, 25.]

QUESTIONS, arising on Bills of Interpleader, are disposed of in various modes, according to the nature of the question, and the manner, in which it is brought before the Court.

Interpleading Bill is considered as putting the Defendants to contest their respective claims; as a Bill by an Executor or Trustee to obtain the direction of the Court upon the adverse claims of the Defendants. Therefore at the Hearing, if the question between the Defendants is ripe for decision, the Court decides it; and, if not ripe for decision, directs an Action, or an Issue, or a Reference to the Master, as best suited to the nature of the Case (a), [p. 203.]

Accordingly upon objections under the Annuity Act a Reference was directed, whether proper Memorials were enrolled, and to state the priorities of such as are valid, [p. 203.]

Interpleading Bill by a tenant to ascertain, to which of two claimants he was to pay his rent. The one establishing his title by evidence, the other making default at the Hearing, payment decreed to the former; and a perpetual Injunction against the other [204.]

THIS cause (1) standing in the paper for hearing, a difficulty arose as to the mode of proceeding upon an Interpleading Bill: the question between the Defendants not being ripe for decision.

[\* 203] \*THE MASTER OF THE ROLLS suggested a reference to the Master.

Sir Samuel Romilly, Mr. Bell, and Mr. Wingfield, for the Defendants, contended against a reference to the Master, or an issue, except by consent; upon which only *The Duke of Bolton v. Williams* (2) could be justified.

July 25th. THE MASTER OF THE ROLLS [SIR WILLIAM GRANT].—The result of the inquiry I have made into this subject is, that the Court disposes of the questions, arising upon Bills of Interpleader, in various modes, according to the nature of the question; and the manner, in which it is brought before the Court. An Interpleading Bill is considered as putting the Defendants to contest their respective claims, just as a Bill by an executor or trustee to obtain the direction of the Court upon the adverse claims of the different Defendants. If therefore at the hearing the question between the Defendants is ripe for decision, the Court decides it; and, if it is not ripe for decision, directs an action, or an issue, or a reference to the Master; as may be best suited to the nature of the case. In *The Duke of Bolton v. Williams* the question was ripe for decision; and was decided in favor of one Defendant against the other; and that Decree was affirmed upon the re-hearing. In May 1787, Lord Kenyon had made a similar Decree at the Rolls, in the case of

(a) For the grounds of a Bill of Interpleader, see, *ante*, notes (a) and (b) *Langston v. Boylston*, 2 V. 101.

(1) Reported, *ante*, vol. xv. 244; when the Injunction was continued. 2 *Mex* 164.

(2) 4 Bro. C. C. 297; *ante*, vol. ii. 138.

*Hodges v. Smith* (1). The Bill in that cause was filed by a tenant for the purpose of ascertaining to which of two different \* claimants he was to pay his rent (2): one of the De- [\* 204] fendants established his title by evidence: the other made default at the hearing. Lord Kenyon directed the rent for the future to be paid to the one; and granted a perpetual injunction against the other. That could not be such a Decree as is ordinarily made, at the prayer of the Plaintiff, where the Defendant makes default; for the Plaintiff in an Interpleading Bill does not pray any Decree in favor of one Defendant against another. It must therefore have been either a Decree, prayed by one of the Defendants, or such as the Court thought it right to pronounce between them.

In this case, the question not being ripe for decision, the precedent of *Aldrich v. Thompson* (3) seems the proper one to follow. Mrs. Hadden having abandoned all her objections to the annuities, except as to their enrolment, the reference to the Master must be to inquire, whether proper memorials of the different annuities had been enrolled, and to state the respective priorities of such of them as are valid.

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SEE, *ante*, the notes to *S. C.*, 15 V. 244.

## JACKSON v. POWNAL.

[1809, JULY 13.]

ORDER, dismissing the Bill for want of prosecution, after three Terms without replication, of course, without notice; and not discharged upon special circumstances, except on payment of Costs.

A MOTION was made to discharge an Order, 19th May, 1809, dismissing the Bill for want of prosecution: three Terms having elapsed after Answer without Replication; and that the Plaintiff may be at liberty to amend the Bill, amending the Defendant's copy, and requiring no farther Answer. The affidavits stated, that the Bill was filed on or about the 14th of January, 1808: the Answer, 15th June, 1808, two days before Trinity Term. Soon afterwards a copy was sent to the Plaintiff at Liverpool; whose Solicitor returned the papers with instructions to amend; which were laid before Counsel: but owing to the pressure of business the amendments were not prepared: the papers remaining with Counsel from August or September 1808 to the beginning of June 1809.

\* Sir Samuel Romilly and Mr. Bell, in support of the [\* 205]

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(1) 1 Cox, 357.

(2) See, *ante*, *Dungey v. Angove*, vol. ii. 304; *Coutan v. Williams*, ix. 107; and the note, ii. 107.

(3) 2 Bro. C. C. 149.

Motion, stated, that a note had not been handed over by the Defendant's Clerk in Court, according to the courtesy, that had been usual ; and, admitting that not to be necessary, according to the practice, as lately settled (1), pressed the Motion in this particular instance, and without Costs, upon the circumstances ; that, when the Order was obtained, the Answer was before Counsel, to advise upon as to putting some facts in issue : offering to reply without requiring any farther Answer.

Mr. *Richards* and Mr. *William Agar*, for the Defendant, opposed the Motion ; relying on the practice, as lately corrected.

The Lord CHANCELLOR [ELDON].—The question, whether it is necessary to hand over a note before you move to dismiss the Bill for want of prosecution, was to my surprise discussed here lately. There is no doubt, that it is not necessary ; but, besides that determination, I have uniformly refused to grant this sort of Motion, except on payment of Costs, upon this ground ; that it is very oppressive, that parties, who have acted regularly, should be put to expense by their regularity. I believe, the suitors are deprived of many of their rights by these habits of courtesy ; and I do not wish to encourage them.

The Order was made on payment of Costs ; declaring, that on the Plaintiff's undertaking to amend within a week, amending the Defendant's copy, and not requiring any farther Answer, and to reply forthwith, and speed his cause to a hearing, upon Plaintiff's paying Defendants their Costs of obtaining the Order, 19th May last, and of this application, the Order of the 19th of May last be discharged ; and that the Plaintiff be at liberty to amend ; amending the Defendant's Office Copy (2).

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SEE, the notes to the *Anonymous case*, 2 V. 287.

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(1) *Ante*, *Naylor v. Taylor*, 127 ; *Degraves v. Lane*, vol. xv. 291 ; xiv. 492, and the notes.

(2) Reg. Book ; *Fuller v. Willis*, 3 Ves. & Bea. 1 ; *Bellingham v. Bruty*, 1 Mad. 265.

## WALDO v. CALEY.

[Rolls—1808, Dec. 7, 12. 1809, JULY. BEFORE THE LORD CHANCELLOR.  
1809, MAY 30, 31.]

TAUST by Will to pay the income to the testator's wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her with the advice and assistance of his trustees to lay out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife shall judge most worthy and deserving objects; giving a preference always to poor relations.

The object is charity in general; with a preference, but not confined to poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control, of the trustees (a).

Decree, generally, not stayed by an Appeal (b). Upon special application, if unsuccessful, with costs.

Generally, there can be only one re-hearing, [p. 213.]

PETER WALDO, by his Will, dated the 13th of October, 1795, devised to his wife for her life all his freehold and copyhold estates; and after her decease to the use of the second son of Humphrey Sibthorpe, that should be living at the time of her decease, and to the heirs and assigns of such second son; and he gave and bequeathed all his personal estate whatsoever and wheresoever, &c. after payment of his debts, &c. to the Defendants Prince and Caley, their executors and administrators, upon the trusts after declared, viz. "Upon trust to pay the neat income, interest, dividends, and proceeds, thereof, from time to time, as the same shall arise, and grow due and become payable, unto his wife, and her assigns, for and during the term of her natural life; or otherwise to permit and suffer her to receive the same: but nevertheless I do hereby most solemnly enjoin and earnestly desire, and I am thoroughly persuaded from the invariable fidelity and attachment my dear wife has always shown towards me, that she will, after my decease, with the utmost readiness and cheerfulness co-operate with my said trustees in carrying my wishes into execution; and therefore having made a very \* considerable provision for my said dear wife [\* 207] by this my Will, I do direct and desire that she will with the advice and assistance of my said trustees, or the survivor of them, yearly and every year during her life lay out and expend one moiety or half-part of the neat income of my personal estate in promoting charitable purposes, as well those of a public as of a private nature, and more especially in relieving such distressed persons, either the

(a) Words of recommendation are not considered imperative, unless the objects and subjects are certain. See *Pierson v. Garnet*, 2 Bro. C. C. (Am. ed. 1844.) 231, note (c); *Wynne v. Hawkins*, 1 ib. 179, and notes; *Harland v. Trigg*, ib. 144, note (a), and cases cited; *Ford v. Fowler*, 3 Beavan, 146; *Stubbs v. Sargon*, 2 Keen, 255; *S. C. 3 My. & Cr. 507*; *Pope v. Pope*, 10 Sim. 1; *Brunson v. Hunter*, 2 Hill. Ch. 490; *Ram on Wills*, ch. 15, § 24, p. 231-240; *Bull v. Bull*, 8 Conn. 47; note (b) *Bull v. Vardy*, 1 V. 270.

(b) See, *ante*, notes (a) and (b) *Gwynn v. Lethbridge*, 14 V. 587.

widows or children of poor clergymen, or otherwise, as my said wife shall judge most worthy and deserving objects ; giving a preference always to poor relations ;" and from and after the decease of his wife, then upon trust to pay, assign, or transfer, all his said personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, after such payment thereout as aforesaid, unto and among all and every the children of Humphrey Sibthorpe, and Montague Cholmonley, that should be living at the decease of his wife, except the eldest and second sons of the former, and the eldest son of the latter, equally, as tenants in common, and to their executors, &c. Then after some pecuniary and specific legacies the testator appointed his wife, and Prince and Caley, his executors.

The testator died in January, 1803 ; and the executors proved the Will. The Bill prayed, that the funds, forming the clear residue of the testator's personal estate, may be transferred to the Accountant-General ; and that he may be directed from time to time to pay one moiety of the interest and dividends to the Plaintiff Hannah Waldo, the testator's widow, to and for her own use ; and to pay her the other moiety in order that she may from time to time apply the same to such charitable objects and purposes as by the Will expressed, and to permit her to receive a surplus, arising from the charitable

fund, detained by the Defendant Caley in the hands of his [\* 208] bankers, to be applied to the same purposes. The Bill complained of a plan of distribution, in which the Plaintiff had been prevailed upon by the Defendant Caley to join, among several persons, represented as relations of the testator : the Plaintiff insisting, that from their situation and circumstances in life they were not proper objects ; that she was intended to have the sole distribution and control over the charitable disposition, without any restraint by the trustees.

The answer of the Defendant Caley insisted, that one moiety of the net income of the personal estate ought to be distributed, and disposed of in promoting charitable purposes ; giving a preference always to the testator's poor relations ; more especially as the property entirely flowed from the testator himself ; and he has left relations, who in the Defendant's judgment are fair objects of relief ; and submitted, that it was not the intention of the testator, that the Plaintiff should have the sole, absolute, and exclusive, disposal of the charitable fund ; but it was to be disposed of and distributed, with the advice and assistance, and subject to the control and interference of the Defendants, the trustees : otherwise the testator's declaration of a preference to his poor relations might be completely frustrated, as the Plaintiff might give the whole charitable fund to strangers. The Defendant admitted, that he refused the Plaintiff's application to him to give several sums to different public charities ; submitting, that, as the Plaintiff is of a very advanced age, and the whole charitable fund ceases at her death, the balance in the hands of the bankers may be advantageously employed in securing life annuities to such poor relations, whose circumstances may require it : otherwise

they may derive a very short and precarious relief from the charitable fund. The answer farther submitted, that the Plaintiff ought to account for her expenditure and \*distribution [\* 209] of the charitable fund from the testator's death; and that the whole charitable fund, considering the Plaintiff's advanced age, and the circumstances of the testator's poor relations, should henceforth be distributed among the poor relations as the Court shall direct.

Sir *Samuel Romilly*, and *Mr. Wetherell*, for the Plaintiff.—*Mr. Hart*, *Mr. Hall*, and *Mr. Edwards*, for the Defendants, the Trustees.

The cases of *Moggridge v. Thackwell* (1) and *The Attorney General v. Doyley* (2) were referred to by the Defendants; contending, that the Court should interfere by directing a scheme to be prepared, for a distribution among the poor relations.

For the Plaintiff it was insisted, that those cases were not applicable. In *Moggridge v. Thackwell* the trustee was dead. In *The Attorney General v. Doyley* there were two objects: relations, not poor relations; and charitable objects. Charity is the primary object of this testator; poor persons, generally: with a preference only of his poor relations: the selection to be made by his widow, taking the advice of the trustees; but not subject to their approbation or consent. The effect of the plan, which the Defendant has forced upon the Plaintiff, is to convert the testator's charitable intention into a sort of patronage among persons, who cannot be represented proper objects: viz. an attorney: a fellow of a college: a midshipman, &c.

\* 1808. Dec. 12th. The MASTER OF THE ROLLS [Sir [\* 210] WILLIAM GRANT].—I am not much surprised, that some doubt and controversy should have arisen upon this Will, with regard to the degree of influence and control, which the trustees and the widow were respectively to possess in the application of the moiety of the widow's income to charitable purposes; for the intention is rather obscurely expressed, and with some apparent contradiction. From the recommendation to his wife to co-operate with his trustees, it might be supposed, that he was about to devolve upon those trustees some duty, which they were to perform; and in the performance of which his wife might give them her assistance: but in the next sentence he commits the whole trust to the widow herself, and only directs it to be executed with their advice and assistance. Upon the whole however the intention seems to be to vest in her a discretionary power of distributing to such charitable purposes, as she shall think fit, and therefore, though the trustees are to advise and assist, yet, in case of a difference of opinion it is her's that must prevail. Into her hands the whole money is to be

(1) 3 Bro. C. C. 517; *ante*, vol. i. 464; vii. 36.

(2) 4 Vin. 485; 2 Eq. Ca. Ab. 194; *ante*, vol. vii. 58, n.

paid : by her the distribution is to be made ; and by her judgment the fitness of the object is to be determined. There is hardly an opening for them to interfere, except by their advice and assistance. Advice does not include decision : nor does assistance imply the power of control.

It is said, however, that, supposing the discretion to be in the widow, yet it is to a degree limited and circumscribed by the direction for the preference of poor relations. The meaning seems to be, not that poor relations shall be preferred to all other charitable purposes ; but only, that in the distribution, which she may think fit to make to persons in distress, distressed relations shall have the preference : among the poor, poor relations \* shall be preferred.

[\* 211] It is said however, that, to secure the due performance of the trust, a scheme ought to be laid before the Master ; and the trust ought to be carried into execution under the direction of this Court. In the cases referred to there was a sum of money, or a residue, to be distributed among some given description of persons. It belonged to the Court to determine, what persons according to legal construction came within that description ; and to see, that the whole fund was distributed among the ascertained objects of the charity : but in a case, in which there is so great a latitude of description as in this Will, and it is, not a residue, or a sum in gross, that is once for all to be distributed, but part of an annual and temporary income, to be disposed of from year to year, according to a discretion, to be exercised every year, and possibly every day, it seems very difficult for the Court to take upon itself the direction and management of the fund, so to be applied. A scheme must be laid before the Master every year ; for the intention was, not that the charitable fund should be applied during her whole life in one, fixed, uniform, and invariable manner, but that it should be applied from time to time, as proper objects presented themselves for the exercise of her discretion. Where a residue is to be applied, the Court frequently directs a scheme ; even where an unlimited discretion as to distribution is left to a trustee ; and where consequently a scheme can answer no purpose, but to show, that the whole fund is applied to the proper objects. In the case of *Supple v. Lawson* Sir Thomas Sewell states that to be the ground.

As it is not in this case alleged, that any part of the fund has been, nor is there any suspicion, that it will be withheld, I hardly think it necessary to impose upon the widow at the expense of the charity the necessity of annually accounting for the employment

[\* 212] of the fund before \* the Master. The purpose may be answered by reserving to any of the parties liberty to apply, as there shall be occasion, so that, if at any time there shall be ground for supposing, that the fund has not been fairly expended, the Court may be called upon to interfere.

Being of opinion therefore, that the discretion as to the disposition of this fund is in the widow, and not in the trustees, though it is to be exercised with their advice and assistance, and thinking a

scheme not necessary, the Decree must be according to the prayer of the Bill; with liberty for any of the parties to apply; as there shall be occasion.

1809, *May 30th, 31st.* The Decree was pronounced accordingly. From that Decree the Defendants appealed to the Lord Chancellor; and a Motion was made, that proceedings should be stayed under the Decree, until the cause should be heard upon the Appeal.

*May 31st.* The Lord CHANCELLOR [ELDON].—The question in this cause arose upon the effect of a charitable disposition, created by Will. I do not understand, that the point was contended, whether the words of that disposition are mandatory or precatory: but it was admitted, that the Plaintiff was bound to apply the fund to charitable purposes: and the question was whether by the direction, that she should lay out one moiety of the income with the advice and assistance of the trustees, her discretion was put under their control: so, that, if they disagreed, the trust could not be executed: whether their advice and assistance were to have the effect of preventing the personal exercise of her discretion; \*making [\* 213] the interposition of this Court by a scheme necessary. I understand the judgment of the Master of the Rolls to have been, that her own discretion, having a reasonable regard to the object of the testator, was to prevail.

The effect of this motion to stay proceedings under that Decree, until the Appeal shall be heard, is, that, in that interval there shall be no distribution; that, as the fund cannot be distributed, as the Defendant contends it ought to be, it shall not be distributed in any manner. The Plaintiff on the contrary relies on the usual rule; that a judgment is presumed to be right, until it is shown to be wrong. I paused upon this question, with the view to be informed, what the House of Lords has determined, as to the pendency of an Appeal there, by the Order (1), made on the 12th of August, 1807, upon the cause of *Burke*, appellant, v. *Brown*, respondent; stating an ancient practice, that Appeals were considered by the House as staying proceedings in Courts of Equity; and that such practice in very remote times might obtain without much inconvenience in the administration of justice: the number of Appeals formerly being very small; and the whole being generally disposed of in the course of the Session: but that according to the present practice of Courts of Equity, frequently under the observation of the House, an Appeal does not stay proceedings; unless the Court below or the House of Lords upon application in special cases make a special Order; and, attending to the number of Appeals, and the effect the suspension might have, the practice, as now prevailing, cannot be departed from without great inconvenience and oppression. That Order therefore es-

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(1) *Ante*, vol. xv. 184.



tablishes, that an application may be made to this Court in the first instance.

[\* 214] \* The practice with regard to Re-hearings has been, as a general, not an inflexible, rule, to permit only one re-hearing (1); guarding the suitor also against even one re-hearing by an interposition perhaps not sufficient, but very special, upon the head of costs; not trusting merely to the general power of the Court to order costs, leaving the party to recover them; but securing an actual deposit: so that there may be a fund ready to reimburse him in some degree: calculated to prevent vexatious proceedings by still continuing the controversy. A motion to suspend the proceedings altogether must be granted with reference to some of these considerations: first, the nature of the judgment; with regard to which it is in truth a re-hearing; and it is very difficult to suspend the proceedings upon any ground, connected with the merits of the cause, without entering into the nature of the judgment, pronounced upon a discussion of the merits, and deciding the question, whether, when the Appeal shall be heard, the Court will interpose by reversing or altering the Decree. The Court thus regulating its practice as to costs in the case of re-hearings, it should be generally understood, that this motion must be made at the hazard of Costs, if not successful; and certainly such a discretion ought to be very tenderly exerted.

If the proceedings are not to be suspended upon that ground, it can be only upon some ground, furnished by the nature of the effect of the Decree: what is to be done under it: the situation of the party, entrusted with the fund in the mean time; and the irremediable consequences. Some of these considerations must be attended to on both sides in this case. This is a charity, in a course of actual distribution: to endure only for the life of the Plaintiff;

[\* 215] and, attending to the probable duration \* of her existence, the consequence of suspending the proceedings, preventing a distribution by her according to her own discretion, will, if she should die, before the Appeal can be heard, be a reversal of the Decree of the Master of the Rolls, without any judgment by the Court of Appeal, to the utter disappointment of the exercise of that discretion, which, as I must now take it, the testator intended to give to the Plaintiff. In this view, considering that judgment right, the suspension of the proceedings might produce irremediable mischief. There is nothing before me, with regard to the situation of the Plaintiff as to pecuniary means, authorising an inference, that, if she should hereafter take a wrong distribution, she would not be able to furnish the means of setting it right. I anxiously avoid taking notice of the circumstances of conduct, which have been mentioned at the bar; wishing my Order to stand upon the general principle rather than the conduct of the party; and that I have no ground before me for complying with the application to suspend these pro-

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(1) *Ante*, *Brown v. Higge*, vol. viii. 581; see the note, v. 725.

ceedings: an application, which generally, almost universally, where it does not succeed, must fail with costs.

The Motion was accordingly refused with Costs. The Appeal was afterwards abandoned (1).

1. WHERE a testator, after making a charitable bequest gives a power of selecting the persons who shall partake his bounty to an individual in whom he expresses a personal confidence, that power of selection may be exercised with greater latitude by the party to whom the testator thought fit to confide it, than it could by others, to whom, by legal transmission, the duty of distribution may eventually belong, or than would be competent to the court if the execution of the trust were to devolve thereon: *Cole v. Wade*, 16 Ves. 44; and see, *ante*, notes 4, 5, 6, 7, to *Brown v. Higgs*, 4 V. 708.

2. The expense of constant applications to the court in behalf of charities, is a very sufficient reason why such trusts should not (except in cases of necessity), be kept under the direction of the court, to be executed by the court from time to time, but should be executed under a general direction to the trustees, subject of course, to the correction of the court if they misbehave: *The Attorney General v. The Haberdashers' Company*, 1 Ves. Jun. 295. As to the general doctrine with respect to charitable legacies of which the objects are not strictly defined, see notes 5, 6, 7, 8, 9, to *Moggridge v. Thackwell*, 1 V. 464.

3. The case of *Supple v. Lawson*, referred to by Sir Wm. Grant in his judgment in the principal case, is reported in Ambl. 729.

4. As to the importance of the rule that proceedings under a decree should not, in general cases, be stayed by an appeal, see note 4 to *The Canons of St. Paul's v. Crickett*, 2 V. 563.

5. The ordinary practice, Lord Thurlow said, certainly is, not to rehear a rehearing: *For v. Mackreth*, 2 Cox, 159, (and such seems to have been the understanding in *Mackintosh v. Townsend*, 16 Ves. 331); but this rule, at least as certainly, admits exceptions: *Howel v. Howel*, 1 Dick. 426; *Omerod v. Hardman*, 5 Ves. 725. In *Brown v. Higgs*, 8 Ves. 566, Lord Eldon did indeed observe, that if a case, which began at the Rolls, might be reheard there, and then heard on appeal in the Court of Chancery, before it went to the House of Lords, the suitors would have to undergo the expense of four hearings; but his lordship added, whatever consideration might be due to that circumstance, he did not feel himself at liberty to decline the duty of hearing the cause before him, which had been reheard at the Rolls: and in the later case of *Blackburn v. Jepson*, 2 Ves. & Beat. 360, he adhered to the same opinion: see, as relative to this subject, note 2 to *Hill v. Chapman*, 1 V. 405.

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(1) *Willan v. Willan*; the next case. *The Warden and Minor Canons of St. Paul's v. Morris*, *ante*, vol. iv. 316, and the note.

## WILLAN v. WILLAN.

[1809, MAY 31; JUNE 16.]

APPEAL, generally, does not stay proceedings under a Decree (a).  
The Costs upon a special Application follow the Judgment, if unfavorable.

THE Defendant, having appealed to the House of Lords from the Decree, pronounced by the Lord Chancellor in this cause (1), moved that the proceedings should be stayed, until the Appeal should be heard (2).

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Wingfield*, in support of the Motion.—The ground, on which the Court interfered in the case of *The Warden and Minor Canons of St. Paul's v. Morris* (3), exists here: great inconvenience, irremediable mischief, by giving immediate effect to this Decree; changing the possession; attending to the peculiar nature of the trade: a coach-master; who may have great difficulty in procuring premises, so well adapted to his business; and if he should succeed in reversing the Decree may have the land restored to him in a state of cultivation, perfectly inadequate to its present destination. What inconvenience is there on the other side? The Defendant is willing, that the full value of the premises shall be paid into Court, to be laid out for the party, who shall be ultimately entitled: the course adopted in *The Warden and Minor Canons of St. Paul's v. Morris*. The inconvenience is no more than that the Plaintiff, if the Decree stands, will receive the benefit of it, with interest, at a more remote period.

Mr. *Richards*, Mr. *Hart*, and Mr. *Trower*, for the Plaintiff. [\* 217] tiff.—\* There is no sound principle for distinguishing this application from that, which has just failed (4), to suspend the proceedings under a Decree at the Rolls on the ground of an appeal to your Lordship. One circumstance makes this application more unreasonable; that the last case has been heard only once: but this cause has been re-heard. In other respects the mischief is precisely the same. If in *Waldo v. Caley* the Decree should in the result prove to be wrong, the effect must be that property will be distributed, which ought to go to other objects. The mischief may be equally irremediable. The inconvenience from changing the possession may be urged in every case. The general rule, that an Appeal either from the Rolls or to the House of Lords does not stay proceedings, is now established; and is relaxed only under special circumstances.

Sir *Samuel Romilly*, in reply.—The ground, upon which your Lordship refused to interpose in the last case, the inconvenience and

(a) See *ante*, notes (a) and (b) *Gwynn v. Lethbridge*, 14 V. 587.

(1) *Ante*, 72.

(2) See *Waldo v. Caley*; the preceding case.

(3) *Ante*, vol. ix. 316.

(4) *Waldo v. Caley*; the preceding case. *The Warden and Minor Canons of St. Paul's v. Morris*, *ante*, vol. ix. 316, and the note.

mischief, that might be the consequence of suspending the proceedings, must in this instance induce the Court to act : all the inconvenience and mischief being directly the other way. The Plaintiff's object being merely to let these lands, may be fully secured to him : but how is the Defendant to receive that compensation to which he may be entitled? If any circumstances can justify the suspension, this is the case. In the case of *The Warden and Minor Canons of St. Paul's v. Morris* the inconvenience was most pressing upon the Plaintiffs : clergymen, of confined incomes ; and having only life interests.

The Lord CHANCELLOR.—In that case there was no Order to suspend the \*proceedings. The Order of Jan- [\* 218] uary, 1806, that the Defendants should pay into Court the sums, reported due from them, was a sort of compromise between the parties. I understand this Motion to be confined to delivery of possession ; not to prevent taking the accounts, &c.

June 16th. The Lord CHANCELLOR [ELDON].—I have again most anxiously considered this case ; and my opinion remains, that I could not have given to the Defendant the benefit of one lease for twenty-one years ; which I very much wished to do. Considering this case therefore as having been three times heard, I am not justified in withholding the possession from those, who according to my judgment, three times expressed, ought to have it. I give the costs in this case also ; upon this ground ; that, as I expressed in the last case, *Waldo v. Caley*, this application is essentially of the nature of a re-hearing ; and I think, the Costs of these Motions ought to follow the judgment : where it is unfavorable.

SEE, *ante*, the notes to S. C. 16 V. 72.

## FRANKLYN v. COLQUHOUN.

[1809, JULY 27.]

ORDER by one Defendant to examine another, not of course after, as before, a Decree (a).

In a special case, to ascertain, who actually received money, all the trustees having signed the receipt, the Court refused to discharge the Order, made two years before ; but required the examination without delay.

A REFERENCE having been directed to the Master, to review the Report, and to inquire, by whom a sum of money, with which the Defendants, as trustees for \*the sale of an es- [\* 219]

(a) Unlike the practice of Courts of law, a Defendant may in Equity, previous to a decree, move, as of course, to examine a co-defendant, saving just exceptions, where he is such, for form sake, or is not concerned in interest, as where he is

tate, having signed the receipt on the back of the Deed, were charged, was received, and to state all special circumstances, an Order was obtained in July, 1807, by one of the Defendants to examine the other two Defendants before the Master. A Motion was made to discharge that Order, as irregular.

Mr. *Cooke*, in support of the Motion, stated, that one of these Defendants was known to be out of the kingdom; who could not be examined in reasonable time: the effect must therefore be to stop the inquiry. Interrogatories ought to have been exhibited immediately to the Defendants, as parties, according to the usual provision in the Decree, not as witnesses; and at least terms ought to be imposed, to insure dispatch.

Sir *Arthur Piggott*, and Sir *Samuel Romilly*, Mr. *Richards*, and Mr. *Gyffin Wilson*, opposed the Motion; insisting upon the right to ascertain, who had received the money; and that the Order for one Defendant to examine another, which is of course before the Decree, may be made after it, with some exceptions.

The Lord CHANCELLOR [ELDON].—Previously to a Decree one Defendant may move to examine another, saving just exceptions: otherwise a witness would probably be made a Defendant, merely to deprive another party of his testimony. I have always thought that not a Motion of course after a Decree (1); though a special ground may be laid; and it would be difficult to state a stronger case than, where, all the trustees being answerable *prima facie*, circumstances may show, that some only ought to be answerable: a fact, which perhaps can only be proved by some of them. Ad-

mitting, that this Order cannot be obtained of course, I  
[\* 220] \* am not inclined, after it has stood two years, to disturb it, as irregular; and the best course will be to have these parties examined without delay.

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SEE note 1 to *Seton v. Slade*, 7 V. 265.

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only a guardian *ad litem*, or merely a trustee, or disclaims, or when no decree is sought against him. If it were otherwise, a witness would probably be made a defendant, merely to deprive another party of his testimony; 2 Madd. Ch. Pr. 416.

After a decree the order for an examination of a co-defendant is not of course, as if when application is made before a decree; 2 ib. 500.

(1) *Purcell v. M'Namara*, *post*, vol. xvii. 434.

## PARTINGTON v. HOBSON.

[1809, JULY 25; AUGUST 1.]

INJUNCTION extended to stay Trial on Affidavit, that the Plaintiff is advised and believes, that he cannot safely proceed to Trial until the Answer; but it has been since determined, that the Affidavit must state his belief, that the Answer will give discovery, material to his defence (a).

Different practice of the Courts of King's Bench and Common Pleas as to putting off a Trial in the absence of a Witness; the former being satisfied with an Affidavit, that the party cannot safely go to Trial without the evidence: the latter requiring the reason, [p. 222.]

THE Bill prayed the specific performance of an agreement for the sale of freehold premises; of which possession had been given to the Plaintiff under the agreement. The Bill had been filed in January, 1808, but the subpoena was not served until May 1809. The Defendants having brought an ejectment to recover the possession of the premises, the Plaintiff obtained the common Injunction to stay execution, the Defendants having obtained time to answer. A Motion was made to extend the Injunction to staying trial, on an affidavit, which, after stating the facts of the case, concluded with a declaration in the following terms:—That the deponent is advised and believes, that he cannot safely proceed to trial, until the Defendants have put in their answers in the suit in this Court.

Mr. Hart and Mr. David Jones, in support of the Motion, cited *Hartly v. Hobson*, (1). *Farrar v. Lewis* (2). *Revet v. Braham* (3). *Wright v. Braine* (4). *Nelthorpe v. Law* (5). In the case of *Jones v. —* (6) an affidavit, in the same terms as this, was held sufficient; and in the subsequent \*cases *Pearson v. —* [\* 221] *Garlicke* (7) and *Nelthorpe v. Law* (8), upon an attempt to obtain the extended Injunction in the first instance according to the practice of the Court of Exchequer, the subject was again under the view of this Court. In a late case in the Court of Exchequer, *Rix v. Zang*, the terms of the affidavit were that the Defendant *expects*, that the answer would disclose a material discovery; and is advised, that he cannot safely go to trial without it; which was held insufficient on the ground, that the word “expects” was

(a) Eden, Injunct. (2d Am. ed.) 105–110; *Wright v. Braine*, 3 Bro. C. C. (Am. ed. 1844), 87, note (a); 1 Smith, Ch. Pr. (Am. ed.) 611; 2 Madd. Ch. Pr. (4th Am. ed.) 218, 219; 1 Barbour, Ch. Pr. b. 3, c. 5, p. 626. If the Injunction does not state the situation of the suit at law, no injunction to stay proceedings therein can be granted. *Teller v. Van Deusen*, 3 Paige, 33; see *Melick v. Drake*, 6 Paige, 470; *Dickey v. Craig*, 5 Paige, 283; *Hegeman v. Wilson*, 8 Paige, 29; *Boker v. Curtis*, 2 Edw. 111.

(1) 2 Dick. 728.

(2) 2 Dick. 729.

(3) 2 Bro. C. C. 640.

(4) 3 Bro. C. C. 87.

(5) *Ante*, vol. xiii. 323.

(6) *Ante*, vol. viii. 46.

(7) *Ante*, vol. x. 450; see the note, 452.

(8) *Ante*, vol. xiii. 323.

substituted for the usual word "believes." Lord Thurlow put this limitation upon the rule; that, if the Defendant is in this country, and can put in his answer easily, the general form is sufficient; but if he is abroad, a special ground must be stated to show, that the discovery required is material.

Mr. *William Agar*, for the Defendant.—The Plaintiff, making this application, must state by affidavit, not only, that he cannot safely proceed to trial without the Defendant's answer, but, farther, that he believes, the answer, if true, will afford important evidence, to be used upon the trial. It may be true, that with or without the answer he cannot safely proceed to trial. In the cases in *Dickens* the point was, that the affidavit should be particular in stating the discovery, expected from the Defendant.

The Lord CHANCELLOR [ELDON].—The question depends altogether upon the point, whether this affidavit is according [\*222] to the course of the Court. \*If it is not, the Defendant has no occasion, if it is, he is not permitted to answer it by affidavit. I apprehend, it will be found, that all these Orders proceed upon a mere affidavit, that the Plaintiff cannot safely proceed to trial without the answer.

Sir *Samuel Romilly* (*Amicus Curie*) said, Lord Rosslyn had refused the Order on his application with such an affidavit; stating, that the Plaintiff must proceed to allege, that he expects a material discovery; and that the rule upon this subject here is exactly the same as upon an application at Law to put off a trial on account of the absence of a material witness; upon which the party must proceed to state, that the evidence will be material. In many instances since this Order has been made on affidavit, stating only, that the Plaintiff expects a material discovery from the answer.

The Lord CHANCELLOR [ELDON].—The practice of the Court of King's Bench and Common Pleas appears by the Books of Practice to differ upon this subject: the former being satisfied with an affidavit, that the party cannot safely go to trial without the evidence: the latter requiring the reason.

*Aug. 1st.* The Lord CHANCELLOR made the Order: the Plaintiff undertaking to submit to such Order with regard to the possession as after Answer the Court shall think right (1).

SEE, the note to *Jones v. ———*, 8 V. 46, and the note to *Garlick v. Pearson* 10 V. 450.

(1) In *Appleyard v. Seton*, the next case, the Lord Chancellor held the practice, admitted in this case, to be wrong; and that the affidavit must state the Plaintiff's belief, that the Answer will give discovery, material to his defence at Law.

## APPLEYARD v. SETON.

[1809, August 3.]

To extend an Injunction to stay Trial, the Affidavit must state belief, not merely that Plaintiff cannot safely go to Trial, but that the Answer will furnish discovery material to his defence in the Action (a).

SIR ARTHUR PIGGOTT, for the Plaintiff, moved, that the Injunction, granted in this cause, should be extended to stay trial.

Mr. *Heald*, for the Defendant, objected, that the affidavit went no farther than stating, that the Plaintiff is advised and believes, that he cannot safely go to trial without the answer; that he ought to state farther, that he believes, that the discovery will be material to his defence at Law; referring to the Books of Practice (1).

The Lord CHANCELLOR [ELDON] said, the Affidavit must go farther; and state, that the Plaintiff believes, that the Answer will furnish discovery material to his defence in the action: as it may be true, that he cannot safely go to trial with or without the Answer. His Lordship, being reminded of the case of *Partington v. Hobson* (2), said, he thought it wrong; and, if the old practice was, as he believed it to have been, it certainly ought to be altered.

The Plaintiff was permitted to amend his Affidavit. The Lord Chancellor a few days before in another case determined the practice in the same way.

SEE the references given in the note to the last preceding case.

## LORD GRENVILLE v. BLYTH.

[\* 224]

[ROLLS.—1809, JULY 28; AUGUST 2.]

EQUITABLE recovery valid; though the tenant in tail was not at the time in actual receipt of the rents; which the trustee paid over to others under a Decree, afterwards reversed.

No analogy between legal and equitable Recovery with reference to possession with, or adverse to, the title, [p. 230.]

To make a legal tenant to the *Præcipe* possession by seisin in fact or law is absolutely necessary; otherwise no legal freehold is acquired; but in the other case, as it is not the object, nor can ever be the effect, of the conveyance to transfer the possession, but only to pass the equitable interest, if he has a sufficient equitable interest, viz. an equitable estate tail, the Recovery is well suffered, [p. 230.]

THE prayer of the Bill in this cause was, that the Defendant may be decreed specifically to perform his agreement for the purchase of

(a) See *ante*, note (a) *Partington v. Hobson*, p. 220.

(1) *Practical Reg.* 252; *Hinde*, 557.

(2) *Ante*: the last case; see the note vol. x. 452.



an estate from the Plaintiff, for the sum of 17,200*l*. The only objection was to the title, under these circumstances.

The premises, which were the subject of the purchase, were part of the estate of Burnham, in the county of Norfolk, purchased in 1752 by Pinckney Wilkinson; which purchase was the subject of the causes of *Pitt v. Jackson* (1), and *Smith v. Lord Camelford* (2). The declaration of the Decree in the former of those causes, in 1786, that no part of the trust funds under the marriage settlement of Mr. Wilkinson had been invested in the purchase of real estate, was reversed by the Decree in the latter cause, in 1795, upon the Bill of Review; and it was then declared, that the trust funds were vested in the purchase of the estates at Burnham; which the testator Wilkinson paid for on the 3d and 15th of March, 1752, by the joint direction and appointment of himself and his wife, pursuant to the terms of his marriage settlement, signified to the trustees upon the 7th of June, 1753; and that the said estates became thereupon subject in equity to the uses and trusts of that settlement; and it was declared, that the Defendant John Close was a trustee of the estates, conveyed to Mark Close, his late father, upon the trusts aforesaid, as far as the same were capable of taking effect; and the Plaintiff Mary Smith was entitled in equity to one moiety of the said estates, as tenant in tail; and the Defendant Close was to declare the trusts thereof accordingly.

[\* 225] \* By indentures of bargain and sale, dated the 8th of February, 1790, before the Bill of Review was filed, John and Mary Smith bargained and sold to Joseph White and his heirs an undivided moiety of the Burnham estate; to the intent, that a recovery might be suffered; in which Smith and his wife were to be the vouchees; which recovery was suffered accordingly in Easter Term, 30 Geo. III. Under that recovery Lord Grenville purchased in 1806 from the children of Mr. and Mrs. Smith, or their trustees; and the objection, taken to the title, was, that, as Lord and Lady Camelford were at the time of suffering the recovery in the actual possession or receipt of the rents and profits under the Decree of 1786 of that moiety of the premises, which by the Decree of 1795 was declared to belong to Mrs. Smith in tail, John and Mary Smith were not at the time of suffering the recovery capable of making a tenant to the præcipe; and therefore the recovery did not bar the estate tail: the Bill insisting, that as the right of Mrs. Smith was recognized by the Decree of 1795, the possession of Lord and Lady Camelford was tortious; and the legal estate in the said moiety being vested in Close or his heirs, and the equitable interest actually belonging to Mary Smith in tail, though her right had not been then declared, Close or his heirs ought to be considered as having been seised of the legal estate in trust for her; and the possession of Lord and Lady Camelford could not invalidate the recovery.

(1) 2 Bro. C. C. 51.

(2) *Ante*, vol. ii. 698.

Sir *Arthur Pigott*, Mr. *Bell*, and Mr. *Preston*, for the Plaintiff.—There is no foundation for the objection, taken to this title. This is the first instance of setting up the notion of an equitable disseisin. Equitable recoveries, which are the subject of daily practice, in this respect have no \*analogy to legal recoveries. It is [\* 226] not easy to find authorities upon a point of so much novelty. This is not like the case of *Wynne v. Cook* (1). A question in some respects similar arose in *Pigott v. Waller* (2); but there was an adverse possession; which there was not in this instance; and there clearly the object was not to comprise in the recovery the premises in question; which in this instance was the only object. The effect of this doctrine must be, that trustees will have the power by paying the rent to a stranger to defeat the recovery of the party entitled. In the case of *Brydges v. Brydges* (3) Lord Alvanley states clearly, that no act of the trustee can affect the title of the *Cestui que trust*. What incident to an equitable estate tail is of greater value than the right to suffer a common recovery? The true foundation of equitable recoveries appears in the opinion of Lord Chief Justice Willes in the House of Lords upon the case of *Martin v. Strachan* (4). Legal reasons and principles are perfectly inapplicable to equitable estates. The estate of the trustee enures to the use of all persons having title: but if this objection prevails, a trustee, having imposed upon him the duty of supporting the *Cestui que trust* in the enjoyment of his property, will be enabled fraudulently to defeat the fair exercise of his right to suffer a common recovery.

Sir *Samuel Romilly*, Mr. *Johnson*, and Mr. *Raithby*, for the Defendant.—Some expressions, that fell from the Court in the case of *Pigott v. Waller*, appear to imply, that, if that had been the case of an equitable tenant in tail, out of possession, or disseised, as if there had been a receipt of rent in opposition to that title, the recovery would not have \*been valid. It is singular, if there [\* 227] can be no such thing as an equitable disseisin, that the expression “equitable seisin” is so usual. In the year 1790 the possession was held in direct opposition to the claim of Mr. and Mrs. Smith; and that possession was supported by a Decree of this Court, declaring, that the trustee, having the legal estate, held it for another person. If an equitable disseisin can take place, this must amount to it. The case of *Pigott v. Waller* has certainly a considerable resemblance to this. Upon the question, whether the purchased estates were comprised in the recovery, the Court (5) observes, that from a fact, that occurred, an inference was drawn, that at the time of the recovery the party must have been out of possession; and proceeds to reason upon that, as a case of adverse possession, obtained against the true owner; by which he was disabled from making an

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(1) 1 Bro. C. C. 515.

(2) *Ante*, vol. vii. 98.

(3) *Ante*, vol. iii. 120; see 127.

(4) Willes, 450.

(5) *Ante*, vol. vii. 121.

estate of freehold, to suffer a recovery. That is said of a case, admitted to be that of an equitable estate: the attention of the Court certainly not being drawn to the point in this way, that there could be no adverse possession against the equitable title for this purpose. There is no doubt, than an equitable tenant in tail may suffer a recovery; provided he was not out of possession, that is, that there was not a hostile possession to him at the time; and it may be very difficult to determine, when he can be said to be disseised: a disseisin at law admitting no doubt. This case however is equally free from doubt; and there is no use therefore in considering cases, which might involve considerable difficulty. The only proper tribunal decided against the Equity of Mr. and Mrs. Smith; and put in possession a person, having an adverse claim. Is not that an equitable ouster? The expression "equitable seisin" is strictly as inaccurate as "equitable disseisin" is supposed to be. The trustee

[\* 228] \* alone can, strictly speaking, be represented as seised; and all other persons are disseised. It will not depend upon the act of the trustee. If he should let into possession a stranger, having no right, that stranger would be the trustee. The effect of the Decree is an equitable disseisin; as a person, turned out of possession by ejectment, would be legally disseised. Equitable recovery has been adopted with perfect analogy to a recovery at Common Law, as the means of putting an end to an equitable estate tail. Though it is difficult, the Court carries that analogy throughout. Entry may be an equivocal act: but the adverse possession under the Will of Mr. Wilkinson, which is utterly inconsistent with the settlement, admits no doubt. The ground of the objection, which does not aim at the destruction of equitable recoveries, is, that Mr. and Mrs. Smith under the circumstances could not transfer an estate, so as to make a tenant to the præcipe for the purpose of suffering a recovery; who could not have called for the possession: the trust having been declared by the Court for Lord and Lady Camelford. The effect is an ouster: Lord and Lady Camelford being in by wrong, under the first Decree, are disseisors by analogy; and the possessions adverse. The principles, upon which equitable recoveries stand, appear in *North v. Way* (1); where Lord Nottingham observes, that natural justice is the rule here: not the niceties of Law: *Kirkham v. Smith* (2), *Salvin v. Thornton* (3), and *Brydges v. Brydges* (4).

Sir Arthur Piggott, in reply.—For the purpose of suffering an equitable recovery no more is required than the title to ownership; and the \* introduction of a different principle will produce very mischievous consequences to property. A trust is merely the creature of this Court; and the equitable rights of *Cestui que Trust* in tail are equally independent of possession, or receipt of the rents, as those of a *Cestui que Trust* in fee or for life.

(1) 1 Vern. 13.

(2) Amb. 518.

(3) 1 Bro. C. C. 73, n.

(4) *Ante*, vol. iii. 120.

This has been always so understood ; and there is no authority requiring a possession analogous to the perception of rents and profits. The only foundation of the objection is, that Mr. and Mrs. Smith were out of possession ; the other tenants in common receiving the whole rents. The Decree of 1786 is relied on, as working dispossession : but the Decree of 1795, upon the Bill of Review, annihilating the former decree, qualifies, and gives a character to, the possession under it. That Decree, when reversed, must be considered as having never existed. It cannot be sustained for the purpose of defeating those who have title. The expressions in the judgment of *Pigott v. Waller*, when that case is attentively examined, do not justify the conclusion that has been supposed, with reference to the receipt of the rents, that the recovery would have been bad. It is plain, on the contrary, that very little reliance was placed on those circumstances. There was no intention to suffer a recovery of the purchased estates. Here no reasonable doubt of that intention can be entertained. If this question should be determined against the title, a principle, pregnant with objections to equitable recoveries, will be established, by setting up an adverse possession either by the act of the trustee or otherwise.

*Aug. 2d.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question, whether the right of the tenant in tail of an equitable estate to suffer an equitable recovery can in any case be \* affected by an adverse possession, it is not necessary to [\*230] determine ; for it does not seem to me, that there ever was in this case a possession, which could in a Court of Equity be considered as adverse to the title of the parties, who have suffered this recovery. Upon that subject all, that is to be inferred from the case of *Pigott v. Waller* (1), is, that the Court did not think it necessary, unless the facts required it, to enter into the question of law. It did not appear, that there was any possession in any one, except the person, who suffered the recovery : therefore the legal question did not arise. I should think however, that there is no analogy between a legal and an equitable recovery in the particular point, to which the objection, that has been taken, refers. To make a legal tenant to the præcipe it is absolutely necessary, that there should be possession by seisin in fact, or in law : but the equitable owner never has the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if you show, that the possession was not in the party, and consequently would not pass from him, the purpose of the conveyance is frustrated : no legal freehold is acquired : but in the other case it is not the object, nor can ever be the effect, of the conveyance to transfer the possession ; but only to pass the equitable interest. One should suppose therefore, that the only inquiry would be, whether there was in the party such a *quantum* of equitable interest as entitled him to suffer

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(1) *Ante*, vol. vii. 98.

an equitable recovery. It is now found by the Decree, that Mr. and Mrs. Smith had in them an equitable estate tail at the time the recovery was suffered. The conclusion seems to be, that it was well suffered.

[\* 231] But in this case there never was any possession, except such as must be considered as wholly referrible to the trusts of Mr. Pinckney Wilkinson's settlement. At one time indeed it was erroneously conceived, and declared, that these estates did not belong to the trust: but it was afterwards ascertained, and declared, that they were purchased for the trust; and that from the moment of the purchase downwards they were the trust property. Mr. Wilkinson, who knew, they were so purchased, could not by his Will in any way affect the interests of those, who were entitled under this settlement. In the hands of his devisees the estates were as much subject to the trusts of the settlement as they would have been in his own. By his wrongful act in taking the conveyance to a trustee for himself, instead of taking it, as he ought to have done, to the uses of the settlement, the evidence was obscured; and when the first Decree was made the estate was supposed to be his own: but the second Decree completely supersedes and annuls the declaration, made upon that erroneous supposition; and declares, that these estates were from the beginning trust estates. The consequence is, that the adverse character, at one time ascribed to the possession of Lord and Lady Camelford, is determined not to have belonged to it; and it is ascertained, that it was a possession wholly referrible to the trusts of the settlement, and not of the Will; and therefore in effect in the contemplation of this Court it was the possession of those, entitled under the limitations of that settlement. There is no foundation therefore in fact for the objection; even supposing it could be available in law. The recovery being well suffered, the title is perfectly unexceptionable.

The Decree was made accordingly for a specific performance.

DISSEISIN, strictly speaking, can never take place with regard to a mere equitable estate, but an adverse possession may create such a *quasi* disseisin as may operate the same effect of shutting out all inquiry into the title: *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 147, 155, 165, 166; and see, *ante*, note 4 to *Pigott v. Waller*, 7 V. 98, with the farther references there given.

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## RATTRAY v. GEORGE.

[1809, JULY 27, 28.]

PLAINTIFF a pauper. Costs of impertinence expunged from the Answer ordered to be taxed as *Dives* Costs, to be paid into Court (a).  
 Different decisions as to Costs to a pauper, [p. 233.]  
 Costs against a pauper for scandal (b), [p. 234.]  
 Counsel and Agent liable to Costs for scandal and impertinence, [p. 234.]

THE Plaintiff sued *in forma pauperis*. The answer being reported impertinent, an Order was made, directing the Master to expunge the impertinence, and to tax the Plaintiff's costs, in respect of the impertinence.

A motion was made by the Plaintiff, that the Master may be ordered to tax the costs as *Dives* costs.

Mr. Johnson, in support of the Motion, contended, that the Court would exercise a discretion upon this subject: a great proportion of the answer was impertinent; and the order to tax the costs must be understood *Dives* costs; which have been given to paupers in ancient and modern instances.

Mr. Wingfield, for the Defendant, insisted, that the Plaintiff could have only pauper costs: otherwise he would get a premium.

The authorities, referred to were from Tothill (1), *Angell v. Smith* (2), *Scatchmer v. Foulkard* (3), *Hullock* 220, 221, *Wallop v. Warburton* (4), *Denn v. Russell* (5). In that case the Defendant was a pauper; and the Bill was dismissed for want of prosecution. The Defendant, as soon as he had obtained the Order, had the pleadings stamped: paid Counsel and other *Dives* fees; and procured his Bill to be taxed. An exception was taken; which was argued on the 7th of December, 1769: and the question was, whether the Plaintiff should pay such increased costs.

Lord Camden and Sir Thomas Sewell were of opinion, [233] that the Defendant was entitled to such fees as he had paid, and what he had disbursed at the time of the Order; and no more; and therefore allowed the Exception.

*Blanchard v. Killick*, a late case in the Court of Exchequer. The Bill was filed by a widow to set aside a conveyance obtained by fraud: two of the Defendants, Killick and his wife, were paupers; and the Bill was dismissed for want of prosecution. The third Defendant brought in a Bill for himself and the two paupers: but it was decided that the latter were entitled only to *pauper* costs.

The Lord CHANCELLOR [ELDON].—I wish to examine the authori-

(a) As to proceedings and costs *in forma pauperis*, see *ante*, note (b) *Whitelock v. Baker*, 13 V. 511.

(b) 2 Madd. Ch. Pr. 563.

(1) Toth. 237.

(2) Pre. Ch. 219.

(3) 1 Eq. Ca. Ab. 125.

(4) 11th March, 1795; 2 Cox, 409; Har. Ch. Pr. by Mr. Newland, 391.

(5) 1 Dick. 427.

ties, that have been mentioned, and also some manuscript notes. Taking the rule to be, that only *pauper* costs are to be paid in general, that must admit exceptions; and there can be no case calling for more attention. If a *Dives* Defendant may be as scandalous and impertinent, as he pleases, and the pauper is put to get rid of that, the general rule would be most unreasonable.

July 28th. The Lord CHANCELLOR [ELDON].—I am desirous, that the ground of my determination in this particular case may be distinctly understood. There is a great variety of contradictory decisions upon the subject of *pauper* costs. In the year 1701 the opinion of Lord Somers was that where a plea or demurrer was overruled and the costs to be paid to a pauper, they were to be *Dives* costs; as there was no reason, that the Counsel and Solicitor were to give the benefit of their labor in effect to the Defendant. Subsequent cases occurred before Lord Keeper Wright and Lord Camden; and they ordered such costs as had been paid, or [\* 234] were to \* be paid. The latter words are not very intelligible. It was determined as long ago as the time of Tot-hill, that a pauper must pay costs for scandal in an Answer. The practice is farther guarded by the rule, that the Counsel and agent are also liable for costs of this kind. I cannot think it right, that, wherever the Plaintiff sues as a pauper, the Defendant may introduce as much scandal and impertinence as he pleases; being liable only to *pauper* costs. The result of all the authorities is, that the Court has a discretion in each case; and in this the proper Order is, that the Master shall tax *Dives* costs, to be paid into Court; and await the event of the cause in its farther progress. The time may come, when the Plaintiff must be dispaupered, to prevent his receiving these costs.

The Order was made accordingly for taxation of the Costs, as *Dives* Costs, but not for payment (1).

In *Frost v. Preston*, 16 Ves. 160, the question was raised whether a plaintiff who had been permitted to sue in *forma pauperis*, should receive more costs than he was actually out of pocket; but it ended in his being allowed neither *pauper* nor *dives* costs. For a summary of the leading general rules with respect to suits in *forma pauperis*, see, *ante*, the note to *Ex parte Shaw*, 2 V. 40; and the note to *Spencer v. Bryant*, 11 V. 49.

(1) In *Frost v. Preston*, *ante*, 160, the question was not decided. See Beames on Costs, 121, 2, 3.

LINTHWAITE, *Ex parte*.

[1809, August 3.]

PETITION to restrain an Action by Commissioners of Bankruptcy against the assignees for Costs of defending an Action against the Commissioners and Messenger for false imprisonment, in which the Plaintiff was nonsuited, or for a contribution among the creditors, dismissed.

No distinction, exonerating creditors, who were absent: proving by affidavit they adopt all the proceedings.

Warrant of Commissioners of Bankruptcy to arrest a witness may issue at once on disobedience to their summons; and does not require a second summons, [p. 235, note.]

UNDER a Commission of Bankruptcy Thomas Battye was summoned before the Commissioners on the information of the bankrupt, that Battye was in possession of part of the property. He did not attend; and was taken by the Commissioners' Warrant: and after examination was discharged. He brought an action for false imprisonment against the Commissioners and the Messenger; \* in which action he was nonsuited (1). He was [\* 235] afterwards arrested by the Commissioners, and committed to gaol, for the amount of their costs, taxed at 170*l.*: but they were obliged to pay to their Solicitor the taxed costs, amounting to 271*l.* 13*s.* 9*d.*

The Petition, presented by the assignees, stated these facts; and that the Commissioners threaten to bring an action against the petitioners; who have not received sufficient to pay the expenses of the Commission; having been obliged for that purpose to make up the sum of 2*l.* 5*s.* 6*d.*; and there is no prospect of any farther property from the bankrupt, or from Battye; whom the Petition represented to be utterly insolvent. The Petition under these circumstances prayed, that the Commissioners should be restrained from bringing an action; or, if not, that the creditors, who have proved their debts, should contribute towards the costs in proportion to their respective debts.

Sir Samuel Romilly, Mr. Montague, and Mr. Bowdler, in support of the Petition.

Mr. Richards and Mr. Cullen, for some of the Creditors, opposed the petition on the ground, that they were at a distance; and proved their debts by affidavit.

The Lord CHANCELLOR [ELDON].—I cannot restrain the Commissioners from bringing an action; who act under a double security: besides that, \* which every other Judge has in [\* 236] the exercise of his duty, they have the covenant of the assignees. The consequences of complying with the prayer of this pe-

(1) *Battye v. Gresley*, 8 East, 319. That case has determined among other points, that the Commissioners' Warrant for arresting a witness may issue at once upon disobedience to their summons; and does not require a second summons. See upon actions against Commissioners, *Dorwell v. Impey*, 1 Barn. & Cress. 163, and the Stat. 6 Geo. IV. c. 16, s. 41, 2, 3, 44, 90.



tion, would be very general. I do not advert to the distinction, that some of the creditors were not present. For such a purpose a creditor, proving his debt, must be taken to adopt all the proceedings. There is no ground whatsoever for restraining the action of the Commissioners; and I do not see my way to the other point.

The Petition was dismissed. \_\_\_\_\_

1. THE question of contribution to the expenses attendant on a commission of bankruptcy, have been said to be altogether collateral to the bankruptcy, and (at least after the commission has been superseded, and probably if it were subsisting), such a question could not be determined on petition in bankruptcy, but must be the subject of an action at law, or a bill in equity: *Ex parte Wilmhurst*, 1 Glyn & Jameson, 6: though, for many purposes, the jurisdiction in bankruptcy continues after the commission is superseded: *Ex parte Fector*, Buck. 428; *Wright v. Mitchell*, 18 Ves. 293. This latter doctrine was not merely recognised by the Court of King's Bench, in *Ex parte Cowan*, 3 Barn & Ald. 126, but it was there observed, that the greatest injustice would arise from a different conclusion. If difficult questions of law are found to be involved in a petition, the Lord Chancellor directs a bill to be filed, as well for solemn discussion, as to afford an opportunity of appeal from his judgment: but, where such difficulties do not arise, a petition in bankruptcy is *festinum remedium*, and it also contributes not less to the saving of expense than to the saving of time: see, as to this matter, *Utterson v. Mair*, 2 Ves. Jun. 98; *Clarke v. Capron*, 2 Ves. Jun. 668; *Sarton v. Davis*, 18 Ves. 81. That a bill may be sustained for contribution amongst co-assignees in bankruptcy, to reimburse their respective shares of a proper payment made by one of their number, there can be no doubt: *Lingard v. Bromley*, 1 Ves. & Beat. 114.

2. As to the judicial capacity of commissioners of bankrupt, see, *ante*, the note to *Ex parte King*, 11 V. 417; and the note to *Taylor's case*, 8 V. 328.

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### CREW, *Ex parte*.

[1809, August 3.]

A COMMISSION of Bankruptcy against an uncertificated Bankrupt, is, strictly, void. Formerly the course was to let joint and separate Commissions stand together: now either is superseded, as may best answer the ends of justice, by arrangement; notice being given to the creditors under the first Commission: the bankrupt in this instance having traded again in a distant place under another name, that notice was directed.

THE Petition stated, that on the 28th of November, 1795, a Commission of Bankruptcy issued against the Petitioner by the description of Thomas Crew, of Newbury, dealer in hats and umbrellas; under which he was declared a bankrupt; and passed his examination; but never obtained his Certificate. Having remained concealed some time he went to Holyhead; where he traded as a bookseller; and took the name of John Pearson. On the 30th of May, 1809, another Commission issued against him by that name. Before that Commission issued, the creditor, who took it out, was [\* 237] informed by the \*petitioner, that he was not the object of a Commission; being an uncertificated bankrupt. The

prayer of the petition was, that the latter Commission may be superseded at the expense of the petitioning creditor, with the costs of the application.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the Petition, said, it had never been decided, that a second Commission of Bankruptcy may go on against an uncertificated bankrupt. He cannot obtain a certificate under it. The reasoning in *Troughton v. Gitley* (1) cannot apply, where not one of the creditors had notice of the second Commission against this person under the name of *Pearson*.

Mr. *Hart* and Mr. *Cooke*, opposed the Petition.

The Lord CHANCELLOR [ELDON].—I am well aware of all the difficulties, that belong to the case of two Commissions subsisting against the same person. In law the second Commission is good for nothing. The assignee cannot bring an action, or protect himself, under it: in short the second Commission cannot have any operation, except under direction or arrangement here. If a joint Commission issues against persons, one of whom has been declared a bankrupt under a separate Commission against him, the joint Commission is a nullity (2): one of the parties being already a bankrupt under a prior Commission. So, a joint Commission subsisting, a subsequent separate Commission against one of those bankrupts \* is a nullity. We are now in the habit of making [\* 238] an arrangement; superseding the one or the other; as may best answer the ends of justice: but in Lord Hardwicke's time both the joint and separate Commissions stood together; and, that being permitted, the necessity was felt of giving the bankrupt, by arrangement, the benefit of a certificate, to be signed by some creditors, of a class, who, strictly speaking, could not come in. It has therefore been usual upon an application of this sort to direct the Petition to stand over, with notice to the creditors under the prior Commission. Whether the property is to belong to one class of creditors, or to another, or upon what terms it is to be distributed is the subject of arrangement. The case of *Troughton v. Gitley*, and the others, are attended with sufficient difficulty: but they have never been carried to this extent, that the creditors shall not have notice.

The petition was accordingly directed to stand over: notice to be given by the bankrupt to the creditors under the first Commission, and to the petitioning creditor under the last.

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SEE notes 2 and 5 to *Ex parte Brown*, 2 V. 67.

(1) Amb. 630; *Martin v. O'Hara*, Cowp. 824; ante, *Ex parte Martin*, *Ex parte Rhodes*, vol. xv. 114, 539; *Ex parte Lees*, post, 472; see *Ex parte Brown*, ante, vol. ii. 67; and the note, page 69.

(2) See *Ex parte Layton*, ante, vol. vi. 434.

## PAXTON v. DOUGLAS.

[1809, JULY 24, 25, 28.]

WITNESS not compelled to answer Interrogatories, having a direct tendency to subject him to penalties, &c. or having such a connection with them as to form a step towards it (a).

The question should not be made upon exception to the Master's certificate, that he had allowed the Interrogatories, but, if the Witness takes the objection, to the Report, whether the examination is or is not sufficient.

By-law of the East India Company, requiring a discovery by Answer to a Bill in Equity as to transactions, upon which penalties were imposed, confined to the case of a Bill by the Company.

Relaxation of the old practice for the Court to inform a Witness, that he was not bound to answer, [p. 242.]

THE Plaintiffs filed the Bill as creditors of Peter Douglas, deceased, on behalf of themselves and all the other creditors, &c. An exception was taken to the Master's certificate, that he had allowed interrogatories for the examination of Charles Christie; claiming as a bond creditor of Douglas.

The interrogatories, as allowed by the Master, inquired, 1st, generally as to the consideration for the bond for 2600*l.*; whether money, goods, &c.: 2dly, whether Christie was not before and at the date of the bond entitled to four sixteenth parts of the ship *Belvidere*, in the service of the East India Company; and was not the commander of the said ship; whether Douglas did not contract for the purchase of such shares for 2400*l.*: whether that was a fair price: whether it was paid; as to the circumstances of payment, &c.: 3d, whether Douglas, or his nephew James Peter Fearon, at the same time made some and what proposal or offer to purchase from him the command of the said ship, for any and what sum; and how such sum was to be paid and secured: 4th, whether he treated, or made, or concluded, any and what bargain with Douglas or Fearon, for the sale of the command to Fearon for the sum of 2600*l.*, or any other and what sum: 5th, whether, and when he (Christie) resigned the command; and was not Fearon, and when, and by whose recommendation or procurement, appointed to the [\* 240] command: 6th, whether he had, or not, proved \* the bond under a Commission of Bankruptcy against Fearon; and if not, why?

Christie objected to answer these interrogatories; on the ground, that his answer might criminate himself; and subject him to a forfeiture under the East India Company's By-Laws; declaring, that no owner or part owner of any ship, or any commander, or other person, shall directly or indirectly sell, or take any gratuity or consideration, nor shall any person or persons buy, pay, or give, any gratuity or consideration for the command of any ship or ships, to

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(a) See *ante*, note (a) *Claridge v. Hoare*, 14 V. 65; note (a) *Franco v. Bolton*, 3 V. 368; 1 Greenl. Ev. § 451, note.

be freighted to the Company; and, in case any such contract, payment, or gift, shall be made, the Commander, or intended Commander, concerned therein, shall from henceforth be incapable of being employed, or of serving the Company in any capacity whatsoever; and it shall be lawful for the Court of Directors to discharge the ship from the Company's service; if they shall think fit; and moreover the respective parties to such contract receiving, paying, or giving, or contracting to pay, receive, or give, shall severally pay damages to the Company at the rate of double the sum received, or to be received, paid, or given; and all the parties shall be obliged to discover such transactions, as aforesaid, and all the circumstances, relating thereto, by answer upon oath to a Bill in Equity; and shall not plead or demur thereto; and for that purpose proper clauses shall be inserted in all shipping agreements.

Sir *Samuel Romilly*, and Mr. *Winthrop*, in support of the Exception, contended, that, the sale by Christie being upon an illegal consideration, under the By-Law of the East India Company, imposing disabilities and pecuniary penalties upon disobedience to it, the \* party could not be compelled to answer. *Franco* [\* 241] v. *Bolton* (1).

Mr. *Richards* and Mr. *Roupell* for the report, insisted, that Christie, having entered into an engagement with the Company to make a discovery as to any such transaction, could not make the objection; and some of the interrogatories, the first, for instance, going to the consideration, generally, could not be objected to. At least, this creditor coming into equity for assistance, if he cannot be compelled, and does not choose, to answer, ought not to be admitted to the benefit of the Decree.

Sir *Samuel Romilly*, in reply, said, this was to be considered upon interrogatories precisely as if a Bill of Discovery had been filed. The first interrogatory is as liable to objection as any of the rest. The Master having settled them, a particular interrogatory could not be objected to. In *Honeywood v. Selwin* (2) it was held, that the party was protected from answering any thing, that would tend to criminate him; and the particular question put is a strong instance. This creditor cannot be represented as coming for the assistance of the Court; but is prevented from bringing an action by the Decree: this Court taking the administration of the fund into its own hands. The engagement to make a discovery to the East India Company, being in derogation of the protection, afforded by the principle of the Common Law, that no man shall criminate himself, must receive a strict construction; and must therefore be confined to that particular case.

The Lord CHANCELLOR [ELDON].—The objection, with regard to the consent to make a discovery \* applies to a [\* 242] suit by the East India Company only, not to any other

(1) *Ante*, vol. iii. 368.

(2) 3 Atk. 276.

person. The importance and difficulty of this case depends upon these considerations. If a Bill had been filed by the Company against Christie, stating, that he had obtained this bond for such a consideration, it would not have been sufficient for the Defendant to state on the Record, that he could not make the discovery without exposing himself, or giving an answer, that would have a tendency to expose him, to penalties: the Court having no judicial knowledge of the by-laws: but the Defendant might have pleaded. That is one difficulty upon the question, whether these interrogatories are to be addressed to him; as the Master cannot have knowledge, until informed, that these interrogatories will so expose him.

The course, that this sort of examination has taken, is extremely important. Formerly the Judge frequently informed the witness, that he was not bound to answer: so frequently as to prove, that it was the duty of the Court to do so: now it appears to be understood, that he may waive the objection; and proceed, if he thinks proper; and in general it is left to his own discretion. The conclusion is, that the question may be put; and then the point arises; not suppressing the question; assuming, that, if put, the Defendant will avail himself of the objection.

Upon the other point there is no doubt. If a series of questions are put, all meant to establish the same criminality, you cannot pick out a particular question, and say, if that alone had been put, it might have been answered. If it is one step, having a tendency to criminate him, he is not to be compelled to answer.

[\* 243] *July 25th.* \* The Lord CHANCELLOR.—There is a case, in which the practice was considered to be, that an exception would not lie to the Master's Certificate, as having settled interrogatories; but the interrogatories ought to be put to the witnesses; who are to answer as much, or as little, as they please; and then the Master reports, whether the examination is, or is not sufficient; and the Exception is to that Report; not to the Certificate, settling the interrogatories. That case is *Stanyford v. Tudor* (1).

In support of the Exception it was then said, that there were several instances, since that case, of exceptions to the Master's Certificate, settling interrogatories; and as to the objection, that the Master was not apprised of the nature and effect of the question, he had that information from the state of facts, laid before him, containing the rules of the Company.

The Lord CHANCELLOR [ELDON].—Supposing that got over, the other point is very considerable; and my opinion upon that is, that every one of these questions may be met by the witness: most of them as having a direct tendency to criminate him: others as having a tendency, connecting them with those. I admit the answer, that has been given to the objection I made, is satisfactory: viz. that the

Master was informed by the state of facts of circumstances, which otherwise he would not have known: but my opinion at present is, that the objection is not to putting the question, but to answering it, when put: that the witness is before the Master precisely \* in the situation of a witness, called to give his evidence [\* 244] personally; and the objection is, not to the question, but to answering it. I therefore think at present, that the interrogatories must be put to the witness; and it must be left to himself, whether he will answer them, or not.

*July 28th.* The Lord CHANCELLOR.—The Exception should be, not to the propriety of the interrogatories, but to the Master's Report upon what he does, after the interrogatories are addressed to the witness. This Exception must therefore be disallowed: but, as the case is new and special, the deposit may be taken back (1).

As to the rule, that no party or witness can be compelled to criminate himself, see, *ante*, the note to *Cartwright v. Green*, 8 V. 405.

### CAMPBELL, *Ex parte*.

[1809, August 7.]

**PROOF** in Bankruptcy under a covenant by the Bankrupt in consideration of marriage immediately after the marriage, or whenever afterwards requested by the trustees, to transfer 2000*l.* stock, alleged to be standing in his name; though not the fact: but the specific time of the request must be ascertained.

THIS Petition, supported by affidavits, stated, that by a settlement, previous to the marriage of William and Ann Johnson, dated the 24th of July, 1799, reciting, that William Johnson was possessed in his own right of 2000*l.* 5 per cent. Bank Annuities, standing in his own name, and that Ann Johnson was possessed of 400*l.* 3 per cent. Bank Annuities, standing in her name, and that it was agreed, that the reversionary interest in premises at St. Alban's, belonging to William Johnson, should be conveyed, and the 2000*l.* stock be transferred, \* to the petitioner Campbell and an- [\* 245] other person, since deceased, their heirs, executors, &c. upon the trusts, after mentioned: and that the said 400*l.* Stock should previous to the marriage be transferred to the same trustees, upon the trusts, after mentioned, William Johnson in pursuance of the said agreement, and in consideration of the intended marriage, and for making a provision for the petitioner Ann Johnson, did grant and convey to the trustees all that his reversionary interest (therein alleged to be) expectant on the death of his father in the premises at

(1) See *Hughes v. Williams*, *ante*, vol. vi. 459.

St. Alban's, to the use of Ann Johnson for life, subject to the life estate of William Johnson the father; then to the use of Johnson the son; and then to the use of the children in special tail; Johnson the younger, for himself, his heirs, executors, &c. covenanted with the trustees, that he would immediately after the marriage, or whenever afterwards, requested by the trustees, or either of them, assign to them, their executors, &c. the said sum of 2000*l.* Stock, alleged to be standing in the name of Johnson: which said Stock, when so transferred, it was declared they and the survivor should stand possessed of upon trust for the separate use of Ann Johnson for life; and after her decease for William Johnson the younger, for life; and after his decease for the children; and as to the 400*l.*, upon the same trusts.

The Petition farther stated, that the settlement was prepared by the Attorney of the husband. The 400*l.* was actually transferred. William Johnson the younger, represented to the petitioners, that his father was to advance him 2 or 3000*l.* immediately upon his marriage; and promised, that he would immediately after his marriage and after receiving his said expected portion fund the said sum of 2000*l.*

Stock, in 5 per cent. Bank Annuities, upon the trusts of [\* 246] the settlement. The petitioner \*Campbell frequently after the marriage required Johnson to place the said 2000*l.* Stock in the 5 per cent. Bank Annuities, upon the trusts of the settlement; which he from time to time promised, but never did; nor ever paid the dividends. On the 30th of June, 1809, a Commission of Bankruptcy issued against him. The petitioner Campbell applied to prove 2970*l.*, being the value of the Stock, and the arrear of dividends; but the proof was rejected on the ground, that Johnson was not possessed of the Stock at the time of the settlement.

The Petition suggested, that the premises at St. Alban's were subject, not only to the life estate of Johnson, the father, but also of his widow, and that the wife of the bankrupt will be totally destitute of support and maintenance; unless the proof shall be admitted; which the Petition accordingly prayed.

Mr. *Alexander* and Mr. *Cullen*, in support of the Petition.—This is an equitable debt upon the covenant of the husband; according to the cases *Ex parte Granger* (1), *Ex parte Gardner* (2). The circumstance, that he had not the Stock, according to the recital in the settlement, makes no difference. Here is no contingency. The covenant is absolute, to assign the said sum of 2000*l.* Stock immediately after the marriage, or whenever afterwards requested. If a Court of Equity would construe this as a covenant, generally, to lay out money in Stock, the only distinction of this case is, that the parties were acquainted with the fact, that the Stock did not exist.

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(1) *Ante*, vol. x. 349.

(2) *Ante*, vol. xi. 40.

It cannot be represented as a fraud upon the creditors. The fraud is only against the wife ; parting with her property upon \* the faith of a stipulation for a settlement of this Stock. [\* 247] What other motive than the benefit of this settlement can be attributed to her ? At least it amounts to a case of mistake on her part ; and from the mere circumstance of the falsehood of the recital she cannot be supposed to have intended to give up that settlement. Upon the head of mistake therefore the Court will give the settlement the effect it was intended to have. The recital is false in another respect. The reversion of the freehold premises, stated to be expectant upon the death of Johnson, the father, is also expectant upon the death of his widow. She has married, and parted with her fortune, upon a stipulation with regard to a fact, that did not exist. The proof, if not for the Stock, must be for the value of the reversionary interest ; which she believed to be according to the representation of the fact, that it was expectant upon the death of the father.

Sir *Samuel Romilly*, for the assignees.—The fact is clear, that both the husband and the wife before the marriage knew, that there was no such Stock as is described in the recital of the settlement ; and that Johnson, the father, had not promised to settle any Stock. This is therefore a covenant for unliquidated damages. The first consideration however is, whether this is not a fraud upon all the creditors ; though the consideration was marriage : the husband with a fraudulent view representing himself as possessed of, and covenanting to settle property, which all parties knew perfectly well, that he had not.

Mr. *Alexander*, in reply.—There can be no fraud in such a contract, to transfer \* Stock within a limited period, [\* 248] by a young man entering into business at the time : a Commission of Bankruptcy issuing against him perhaps ten years afterwards. An action might have been maintained before the bankruptcy.

The Lord CHANCELLOR.—What action ?

*Reply*.—An action upon the covenant ; to which he could not have alleged, that the representation was not true. He warrants the fact to be true ; and would have been estopped. There is no reason to infer, that they did not believe the representation, that Johnson's father had promised to give him that sum. It has been frequently determined, that proof may be made in bankruptcy under a covenant to transfer Stock ; though the amount depends upon accident, as to the price.

The Lord CHANCELLOR [ELDON].—You pray the present price of the Stock. That cannot be ; as it must be taken, either that an action of deceit may be maintained ; and then there could be no proof ; or, that, being called upon, he declined to perform his covenant ; that he cannot say, he had not the Stock ; and therefore it is a case for damages. In the latter way, I think, this may be maintained : but that some specific time must be ascertained, at which



the request was made: as the case of *Utterson v. Vernon* (1) is decisive against the claim, if no request was made. The time, at which the request was made, must be ascertained by reference to the Commissioners.

[\* 249] \* The Petition was ordered to stand over; and a claim to be made, with liberty to file an affidavit as to the time, at which the request was made.

SEE the note to *Ex parte Mare*, 8 V. 335; and the note to *Ex parte Gardner*, 11 V. 40.

## DANIELS v. DAVISON.

[1809, MARCH 17; AUGUST 9.]

THE possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant, or, farther, as in this instance, by an agreement to purchase the premises (a).

Whether, after a contract for sale of an estate, the vendor, selling to a purchaser for valuable consideration without notice, is not accountable for the money as a trustee, *Quere* (b), [p. 249.]

To obtain a specific performance of a contract the subject must be proved, as described.

Defendant, pleading purchase for valuable consideration without notice, must aver, that the vendor was seised; and was in possession; which would be satisfied by the possession of his tenant, [p. 252.]

Tenancy at Will determined by an agreement to purchase, [p. 253.]

Tenancy from year to year favored, [p. 253.]

Lessee for years, with an option at certain periods to purchase, making that option, was considered owner *ab initio*, for the benefit of the heir: the price to be paid by the executor, [p. 253.]

THE Bill stated the following agreement, executed by the Plaintiff and the Defendant Davison:

“Memorandum: it is this day, 1st February, 1802, agreed between John Davison, of the East India House, London, and James

(1) 2 Term Rep. 539; 4 Term Rep. 570; 1 Cooke's Bank. Law, 197; 8th edit. 226.

(a) Where a tenant is in possession of the premises, a purchaser has implied notice of his title. *Hanbury v. Litchfield*, 2 Mylne & K. 629; see *ante*, note (a) *Taylor v. Stibbert*, 2 V. 439. The doctrine of the English law of constructive notice of the title of the leasee or party in the possession, is not favored in the American Courts; 4 Kent, Com. (5th ed.) 179, note; *Scott v. Gallagher*, 14 S. & R. 333; *M'Mechan v. Griffing*, 3 Pick. 149; *Hewes v. Wiswell*, 8 Greenl. 94; *Flagg v. Mann*, 2 Sumner, 556, 557. Apart from any registry possession ought to put the purchaser on inquiry; *Woods v. Farmere*, 7 Watts, 382. As to constructive notice, 1 Story, Eq. Jur. § 400.

(b) After a valid contract for the purchase of land, the vendor is deemed in Equity to stand seised of it for the benefit of the purchaser. 2 Story, Eq. Jur. § 790, 793; 1 Sugden, Vendors & Purch. (6th Am. ed.) ch. 4, § 1, subsec. 15, *et seq.*; *Livingston v. Newkirk*, 3 Johns. ch. 316; *M'Kinnon v. Thompson*, ib. 307, 310.

So a purchaser may sell or charge the estate, before the conveyance is executed.

Daniels, of Ealing, in the county of Middlesex, that the said John Davison shall sell to the said James Daniels, his public house, called the Plough, now in the occupation of the said James Daniels, together with the garden belonging to the said house, for the sum of 200*l.*, to be paid on or before the 25th of March next ensuing, provided the said premises are copyhold, but if it should appear that any part thereof is freehold, then this agreement to be void."

The Bill farther stated, that the Plaintiff, in March, 1802, before the day appointed, tendered the purchase-money; and demanded a surrender: but the Defendant Davison refused to perform the contract; and sold the premises to the Defendant Thomas Rea Cole, for 300*l.*; charging notice of the Plaintiff's agreement before the surrender to Cole, and payment of his money; and prayed a specific performance of the agreement; that Cole [\* 250] may be decreed to surrender to the Plaintiff: or, if it shall appear, that he is a purchaser without notice, that Davison may account for the difference between the price, stipulated by the agreement, and the sum, at which he sold to Cole.

The Defendant Davison by his Answer suggested, that some part of the premises was freehold; and therefore he was discharged from the agreement; admitting however, that he could not distinguish the freehold from the copyhold. The Defendant Cole denied notice of the agreement, until after the Bill was filed; which was in October, 1805; and the Plaintiff's lease was to expire at Michaelmas following. The Answer also admitted that the premises were conveyed to Cole by surrender; the reason of which was represented in evidence to be to save the expense of a lease and release for the freehold part; which could not be exactly ascertained. There was contradictory evidence as to part of the premises being freehold, and upon the point of notice.

The Lord CHANCELLOR, when the cause was opened, said, there was a decision in this Court, that possession of a tenant was notice to a subsequent purchaser of an equitable agreement, which the tenant had; preventing the plea of purchase for valuable consideration without notice; and afterwards mentioned the case of *Taylor v. Stibbert* (1); where Lord Rosslyn lays down, that whoever purchases an estate, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have; stating it to have been determined, that a purchaser, being told, particular parts of the estate were \* in the possession of a tenant, without any information as to his interest, and taking it for granted to be only from year to year, was bound by a lease that tenant had; which was a surprise upon him; as it was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person, with whom he

1 Sugden, Vend. & Purch. (6th Am. ed.) 204, [278]; but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved; ib. See *Boston v. Rushon*, 4 Desauss. 373.

(1) *Ante*, vol. ii. 437; see 440, and the note; *Hall v. Smith*, xiv. 426.

contracted ; that the vendor could not transfer the ownership and possession at the same time ; that there were interests, as to the extent and nature of which it was the purchaser's duty to inquire.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Horne*, for the Plaintiff.—The decision, to which Lord Rosslyn refers, cannot be found : but the proposition is supported by the known established principle of this Court, that whatever puts a purchaser upon inquiry shall be held notice : and if therefore he knows, that a tenant is in possession, he is considered as having notice of the whole extent of his interest ; and bound to admit every claim, which could have been enforced against the vendor. This case, though different in circumstances, is in principle the same ; a tenant, in actual occupation of the premises, claiming an interest against his landlord, not in that character, but as a vendor. The principle extends to any interest, of whatsoever description, which the tenant may have ; binding the purchaser, if, omitting to inquire from the tenant as to the nature and extent of his interest, he takes the representation of the vendor. The difference of circumstances, whether the person, in occupation of the premises, is an actual lessee, with an agreement for renewal, or holds only from year to year, with an agreement for the purchase of the premises, raises no substantial distinction. The purchaser, omitting by reasonable \* diligence to acquire information of his real interest, is bound to confirm it.

Mr. *Alexander*, Mr. *Martin*, and Mr. *Finch*, for the Defendants.—The case of *Taylor v. Stibbert* is not an authority for a Decree under these circumstances. In that case the purchaser had actual notice, that the leases contained covenants for renewal ; which was the true ground for binding him. The want of all notice distinguishes this case. There is no reason, that the purchaser should extend his inquiry beyond the person, with whom he contracted. The inconvenience would be very considerable, if in a large purchase the purchaser should be obliged to apply to every tenant for the purpose of such an inquiry.

The Lord CHANCELLOR [ELDON].—This case involves a point of very great consequence. At this moment I find great difficulty in distinguishing it from the cases of notice. To sustain the plea of purchase for valuable consideration without notice, the Defendant must aver, that the vendor was, or pretended to be, seised ; and that he was in possession ; which would be satisfied by the possession of his tenant. On the other hand if this Plaintiff had no lease, but merely this equitable agreement, and had taken possession under that, the subsequent purchaser could not have made out the averment, that the vendor was in possession. Such an agreement would have determined a tenancy at will. Then as to a tenancy from year to year, which the law favors, is [\* 253] the situation of a person, in possession as such \* tenant, different in equity with regard to third persons, if, making an agreement with his landlord to purchase the premises, instead of giving up the possession, and re-entering under that agreement, he

retains the possession, without going through that ceremony? If he had quitted the possession for a week, the purchaser could not make out the averment, that the vendor was in possession. Suppose a lease for seven years; with an agreement that at the expiration of certain periods the tenant should have an option to purchase: in the case of *Douglas and Witterwonge* (1) Lord Kenyon held, that the benefit of that agreement should go to the heir: the executor paying for the purchase; and the lessee, when he made the option, was to be considered the owner *ab initio*: a strong decision: but, if another person dealt with the lessor pending the currency of the term, who represented the lessee as tenant under a lease, that would be notice of the lease, and all its contents, including that covenant. Where the original entry was as tenant, can the purchaser protect himself under an assurance from that person, who was once landlord, that the relation between them had not been changed? In Equity at least this landlord could not have called for rent. The other might have refused it; and might have claimed under the agreement; as determining the relation of landlord and tenant. If he had led Cole into the purchase, that would have been a different case: but that is not the effect of Cole's answer; which is, that he knew, the Plaintiff was in possession: but did not know the nature of his possession; not taking the trouble to inquire, whether he was tenant or purchaser.

I have a strong persuasion and recollection, with Lord Rosslyn, that there is such a determination, as he asserts in that passage of his judgment (2) to have been made. In the west of England \* leases for lives, with covenant for renewal upon [\* 254] certain terms, are usual. A purchaser, satisfied with an inquiry from the vendor, who gave no farther information, than that the person in possession was tenant for life, would be bound by that covenant.

*Aug. 9th.* The LORD CHANCELLOR [ELDON].—Upon one point in this cause there is considerable authority for the opinion I hold; that, where there is a tenant in possession under a lease, or an agreement, a person, purchasing part of the estate, must be bound to inquire, on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact, that he is entitled to that term; if he does not choose to inquire into the nature of his possession; the tenant being in no fault; but enjoying according to his title. Then if in the instance of such a term the tenant would be entitled against a

(1) This is the case of *Lawes v. Bennett*, 1 Cox, 167; stated from the Lord Chancellor's note, *ante*, vol. vii. 436, 7; xiv. 596. Lord Kenyon's decision was, that the purchase money was the personal estate of the testator, the original lessor, bound by the covenant, and under the Election made to be considered as vendor; and the consequence followed, as here stated; that the benefit of the agreement went to the heir of the purchaser, from whose personal estate the purchase-money was withdrawn; the lessee being considered owner *ab initio*. See *Townley v. Bedwell*, *ante*, xiv. 591.

(2) *Ante*, vol. ii. 440.

purchaser, why is not his title good for a greater interest? In the case of Douglas and Witterwonge the tenant was not bound to know, and did not know, that it was necessary for him to make any communication of the option, which he had by the contract with his landlord to become the purchaser; and Lord Kenyon held, that there was nothing, that could affect his conscience in favor of a purchaser, having no communication with him (1). My opinion therefore, considering this as depending upon notice, is, that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession. That was the doctrine, [\* 255] laid down by Lord \* Rosslyn in the case (2), to which I referred; and I think it right.

My judgment on that point lays out of consideration the question, whether, taking Cole not to be affected with notice, Davison, the vendor, is to be considered in equity as holding the money, derived from the second purchase, viz. the difference between the prices, in trust for the person, to whom he had first agreed to sell the estate. The estate by the first contract becoming the property of the vendee, the effect is, that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate, of which he was so seised in trust; or should not be considered as selling it for the benefit of that person, for whom by the first agreement he became trustee; and therefore liable to account.

It is not however necessary to decide that point; another question being, whether under the actual circumstances this is clearly now a binding contract. Upon the face of the agreement it is binding, if the premises are all copyhold: but, if any part is freehold, there is no contract. This is the express agreement. It is alleged by the Defendant, that the whole, or a part, is freehold: but it is contended on the other side, that he ought not to be permitted to say, any part is freehold; and, if he may, yet there is in this cause evidence, that all the premises are copyhold: and, whether sufficient to persuade the Court, that they are so, or not, it ought to be taken as conclusive against the Defendant. There is by no means sufficient evidence, that all the premises are copyhold: nor is the circumstance, [\* 256] that upon the second sale \* they were bought and sold as copyhold, evidence, that ought to be taken as conclusive against him. In order to decree a specific performance of the first agreement, the subject must be proved, as it is described; and it would be too much to compel the performance where according to the language of the agreement itself there is no contract (3).

(1) This opinion does not appear in the accounts of that case referred to in the preceding page.

(2) *Taylor v. Stibbert*, ante, vol. ii. 437.

(3) 1 Ball. & Beat. 551.

An Inquiry was directed, whether the premises are all copyhold, or a part is freehold (1)

1. WHEN a tenant is in possession of an estate contracted for, the purchaser is assumed to have notice of every sort of interest which the tenant may have in the premises: see, *ante*, note 2 to *Taylor v. Stibbert*, 2 V. 437; and see notes 2, 4, to the same just-cited case, as to the averments necessary to sustain a plea of purchase for valuable consideration, without notice.

2. That, when a purchase contract is finally completed, the estate is considered, in equity, as having belonged to the purchaser from the date of the contract, without any reference to the interests of the several classes of representatives of the contracting parties, see note 5 to *Seton v. Slade*, 7 V. 265.

3. That a plaintiff in a suit for specific performance should, by this bill, set out the exact agreement on which he relies, and distinctly describe the subject thereof, see note 3 to *Mortimer v. Orchard*, 2 V. 243; and note 3 to *Boardman v. Mestyn*, 6 V. 467.

### CHARLES, *Ex parte*.

[1809, AUGUST 5.]

WHETHER judgment for damages in an Action for breach of promise of marriage, by relation to the time of the Verdict forms a debt, that will support a Commission of Bankruptcy, issuing, and the act of bankruptcy committed, in the interval, and as to the effect of the Certificate upon such a debt, *Quære*. The Commission superseded; with the offer of a case.

THE object of this Petition was to supersede a Commission of Bankruptcy upon an objection to the petitioning creditor's debt; which was constituted by a verdict for damages in an action for breach of promise of marriage. The act of bankruptcy, a general assignment of all the effects, was committed, and the Commission issued, between the verdict and the judgment (2).

Sir *Samuel Romilly* in support of the Petition. Mr. *Richards*, for the Assignees.

The Lord CHANCELLOR [ELDON].—A great variety of cases, previous to the case of *Utterson v. Vernon* (3), have held this language; that if \*there was a verdict in Debt, *Assumpsit*, [\*257] or even in *Tort*, before the bankruptcy, the damages may

(1) *Post*, vol. xvii. 433; a specific performance decreed.

(2) When this petition was heard, the facts were not accurately known. The case sent to the Court of King's Bench states, that an Action upon the case was brought by Mary Howell against the petitioner for breach of promise of marriage; in which she obtained a verdict on the 5th of December, 1808: Damages 150*l*. On the 25th of December the act of Bankruptcy was committed by an assignment of all his effects. Judgment was signed in Hilary Term 1809, 31st of January. On the 4th of February, Mary Howell petitioned for the Commission; which issued on the 21st of February upon the debt under that Judgment. The Certificate of the Court of King's Bench stated, that the debt was not a sufficient debt to support a Commission; and afterwards in the Sittings after Trinity Term 1812, upon the petition of the bankrupt, the Commission was superseded with costs: but the Lord Chancellor refused to assign the bond. 14 East, 197.

(3) 3 Term Rep. 539; 4 Term Rep. 570.

be proved under the Commission : as they are liquidated by the verdict. I confess, I feel considerable doubt upon that point. This has, I believe, been decided ; that where the verdict was before, the judgment after, the bankruptcy, the judgment has relation to the time of the verdict ; and the certificate will bar the debt : but that is a very different case from that of a Commission, taken out between the verdict and the judgment. How, if the Commission is taken out before the judgment, can that be the foundation of the petitioning creditor's debt ? The case, to which I allude, is *Longford v. Ellis* (1). That was an action for words ; and a verdict for 10*l.* damages. The Defendant, between the verdict and the judgment, became a bankrupt ; and was afterwards taken in execution upon the judgment. A motion was made for his discharge upon the authority of cases ; which were represented, as being either debt or assumpsit ; and that this was a tort ; and the damages uncertain at the time of the bankruptcy. That could not be in this sense ; that they were not liquidated by the verdict ; which was previous to the bankruptcy. The Court held, that made no difference : the cause of action exists before the verdict : when the verdict is obtained, the damages are known, and become a debt ; and the judgment, when given, relates back to the time, when the verdict was given. The Defendant was accordingly discharged.

If that is the principle, was it possible for the Plaintiff to take out a Commission of Bankruptcy ? I have no conception, what is the accurate interpretation of the expression, that the judgment relates to the verdict. My opinion is, that if the judgment was [\*258] after the bankruptcy, \* there is not a good petitioning creditor's debt ; and I shall supersede the Commission ; unless you will take a case ; which it is proper to offer ; as the opinion I expressed after great consideration in *Ex parte Hill* (2) appears to me to contradict several other cases.

1. ANOTHER note of this case may be found in 1 Rose, 372. The proceedings in the Court of King's Bench upon the case stated for their opinion, is reported in 14 East, 197—210. The judges certified, that the debt of the petitioning creditor was not a sufficient debt in law to support the commission. In *Scott v. Ambrose*, 3 Mau. & Sel. 327, it was said by Lord Ellenborough, that all the courts in Westminster Hall had concurred in the decision in *Ex parte Charles*.

2. As to the cases in which, there being a verdict before, and judgment after bankruptcy, costs *de incremento* are provable under the commission, see, *ante*, the note to *Ex parte Hill*, 11 V. 646.

(1) 1 Cooke's Bank. Law, 185 ; 8th ed. by Mr. Roots, 210 ; cited 1 Hen. Black. 29.

(2) *Ante*, vol. xi. 646 ; see the references.

STERLING, *Ex parte*.

[1809, AUGUST 7.]

ATTORNEY'S lien generally on papers in his possession : not limited to the occasion, on which they were delivered, without special agreement (*a*).

A PETITION was presented by the assignees, under a Commission of Bankruptcy, to have deeds and papers, belonging to the bankrupt, delivered up by an Attorney ; who claimed a lien upon them for his general bill.

An objection was taken on the ground, that these papers were delivered for the purpose of preparing a mortgage ; and the lien was to be limited accordingly.

Mr. *Alexander* and Mr. *Wear*, in support of the Petition.

Mr. *Bell*, for the Solicitor, contended for the general lien ; observing, that there was no instance of an inquiry as to the delivery of the papers ; which with this distinction must occur in every case.

The LORD CHANCELLOR [ELDON].—The general lien must prevail. Different papers are put into the hands of an Attorney, as different occasions \* for furnishing them arise. In the ordinary case of lien I never heard of a question, upon what occasion a particular paper was put into his hands : but if in the general course of dealing the client from time to time hands papers to his Attorney, and does not get them again, when the occasion that required them is at an end, the conclusion is, that they are left with the Attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement : otherwise they are subject to the general lien, which the Attorney has upon all papers in his hands. [\* 259]

The Order was made for taxing the Bill : with a declaration, that the attorney has a lien upon the papers in his possession (1).

SEE note 2 to *Taylor v. Popham*, 13 V. 59.

(*a*) As to the lien of Attorney and Solicitors, see W. W. Story, *Contracts*, § 330.

(1) *Ante*, *Merreveller v. Mellish*, vol. xiii. 161 ; *post*, *Ex parte Pemberton*, xviii. 582 ; *Ex parte Nesbitt*, 2 Sch. & Lef. 279 ; *Bea. on Costs*, 321, 322 ; and as to the lien of the agent in Town, *Ward v. Hepple*, *ante*, vol. xv. 297. The lien superseded by taking security ; *Cowell v. Simpson*, *post*, 275 ; which decision, though questioned in *Stevenson v. Blakelock*, 1 Mau. & Sel. 535, is confirmed in *Chase v. Westmore*, 5 Mau. & Sel. 180, and by the Lord Chancellor in *Balch v. Symes*, 1 Turn. 87. The lien does not attach upon the Will of the client, nor a Deed sought to be impeached : *post*, *Georges v. Georges*, vol. xviii. 294 ; *Balch v. Symes*, 1 Turn. 87.



## NICHOLSON v. SQUIRE.

[1809, Nov. 9.]

COMMITMENT for eloping with a Ward of the Court; and against another person for assisting; ignorance, that she was a Ward of Court, not admitted as an excuse (a).

The parties under Commitment cannot be heard except on Petition.

Clergyman, celebrating marriage by banns without making the inquiry, directed by the Marriage Act, liable to ecclesiastical censure, at least; perhaps to other consequences.

The marriage however good; though neither party was resident in the parish.

UNDER a Petition presented in this cause, an Order was made for the attendance of two performers in a company of actors at Tonbridge: the one, whose name was Giles, for eloping from that place with a young lady, a Ward of the Court: the other, [\* 260] Smith, for assisting \* in that elopement. Smith alone attended; and denied any knowledge, where the other parties were: but hesitating to answer a question from the Lord Chancellor, in what manner he had conveyed a letter, which he acknowledged he had sent to Giles, answering one, received from him, an Order was made for his commitment: the execution of it to be suspended; and he was ordered to attend again: the Lord Chancellor, as the consequence might be either an immediate commitment, or a direction to the Attorney General to institute a prosecution, declining to put any farther questions to him; but permitting him to make an affidavit, if he should think proper. Afterwards the other parties were discovered; and the lady was delivered up; and was ordered to be delivered to a relation; who undertook the care of her until farther Order. Giles was committed to the Fleet; and all the parties, and the Clergyman, who had published the banns of marriage in the parish of Mary-le-bone, were ordered to attend.

Mr. *Bligh*, for Giles and Smith, represented their contrition: their ignorance that the lady was a Ward of Court; that Giles was willing to make any reparation in his power; and that he had no other means of subsistence than his exertions as an actor.

The Lord CHANCELLOR [ELDON].—I cannot hear parties, who are under commitment, except upon petition. I shall however, though the object is upon their own statement apparent, permit them to present a petition. The fact, that he did not know, that this lady was a Ward of the Court, has never been allowed as an available excuse.

[\* 261] \* With regard to the Clergyman, a notion seems to prevail, that every thing is correct, if a paper describing the parties, between whom banns are to be published, being handed up to the Clergyman in the usual manner during the service, he publishes them without more. It is true, that a marriage by banns is good; though neither

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(a) See *ante*, note (a) *Bathurst v. Murray*, 8 V. 74.

of the parties was resident in the parish : but, if a Clergyman, not using due diligence, marries persons, neither of whom is resident in the parish, he is liable at least to Ecclesiastical censure ; perhaps to other consequences. It has been uniformly said, especially as to marriages in London, that the Clergyman cannot possibly ascertain, where the parties are resident : but that is an objection, which a Court, before whom the consideration of it may come, cannot hear. The Act of Parliament (1) has given the means of making the inquiry : and, if the means provided are not sufficient, it is not a valid excuse to the Clergyman, who has not used those means, that he could not find out, where the parties were resident, or either of them. If he has used the means, given to him, and was misled, he is excusable ; but he can never excuse himself if no inquiry was made. The habit of taking the description of the parties in this loose way makes it very excusable in the individual Clergyman : but that is not the notice, intended by the Act of Parliament ; which has a clause (2), expressly requiring, that no parson, vicar, minister, or curate, shall be obliged to publish banns, unless the persons to be married shall seven days at least before the time, required for the first publication of such banns, respectively deliver or cause to be delivered to such parson, &c. a notice in writing of their true christian and surnames, and (not of the parish but) of the house or houses of their respective abodes within such parish, &c. ; and of the time, during which they have dwelt, \*inhabited, or lodged, in [\*262] such house or houses respectively.

The Clergyman therefore has only to repair to the house, in which they are represented to have lived ; and to inform himself whether the statement is true. The explanation, given by this gentleman, satisfies me, that he did not mean ill : but, recollecting the extreme difficulty Lord Thurlow had to avoid committing Dr. Markham, I did not think, I ought to permit this subject to come to a conclusion without stating publicly the law upon it (3).

SEE the note to *Priestley v. Lamb*, 6 V. 421 ; and note 1 to *Stackpole v. Beaumont*, 3 V. 89.

2. An abortive endeavor to marry a ward of court is a contempt : *Water v. Yorke*, 19 Ves. 453. And all the parties implicated in such attempt are liable, not merely to commitment, but, in flagrant cases, to criminal prosecutions : *Ball v. Coutts*, 1 Ves. & Beat. 297 ; *Wade v. Broughton*, 3 Ves. & Beat. 173 ; *Millet v. Rowse*, 7 Ves. 419.

(1) Stat. 26 Geo. II. c. 33.

(2) Sect. 2.

(3) See *ante*, *Priestley v. Lamb*, vol. vi. 421 ; *Millet v. Rowse*, vii. 419 ; *Bathurst v. Murray*, viii. 74 ; and the note, i. 155.

## JONES v. DAVIS (1).

[1809, Nov. 1.]

**NEGATIVE plea.** To a Bill for an account of stone, taken from the Plaintiff's quarry, under a promise to account, alleging assurances, that accounts were kept, Plea, denying only the promise to account, but not that the accounts had been kept, over-ruled (a).

THE Bill prayed an account of stones, which had been taken out of the Plaintiff's quarry by the Bristol Dock Company, to whom the Defendant Davis was Treasurer; for the purposes of making a canal; which they were empowered to make, under an act of Parliament (2), providing, that maps or plans, describing the line, of such intended canal, together with a book of reference, containing a list of the owners and occupiers of such lands and premises, as should be wanted for the purposes of the Act, should be deposited in the [\* 263] office of the Clerk of the Peace; \* in order that the same might be inspected; and that the Company should have authority to vary the line of the said intended canal; so that it should not exceed the limits described in such maps and plans and books of reference.

The Bill stated, that such maps, plans, and books of reference, were deposited with the Clerk of the Peace accordingly; and that the Plaintiff was seized of a piece of land, containing a stone quarry not described or noted in the said maps, plans, or books of reference; and that the Defendant nevertheless without the permission or knowledge of the Plaintiff entered upon the Plaintiff's land; and dug stone out of his quarry; that, as soon as the Plaintiff became apprised of such proceedings, he immediately made a complaint to the Company; when they apologized to him for thus entering upon his land; and informed him, that they should want only 2000 tons of stone. The Plaintiff then requested, that an account should be kept by the Company of the stone, which had been or should be raised by the Company out of his quarry, and that he should be paid for the same at the fair market price; which the Clerks or Agents of the Company promised should be done; and the Plaintiff, relying upon such promise, consented to the Defendant's digging stone out of his quarry accordingly; and since the promise

(1) *Ex relatione.*

(a) It was formerly a question whether a purely negative plea to a Bill was a legitimate mode of defence in Courts of Equity, as it unquestionably is at law. Story, Eq. Pl. § 651, and note; 667, 668, and note. This class of pleas has two peculiarities: in the first place, it relies wholly upon matters stated in the Bill, negating such facts as are *material* to the rights of the plaintiff; and in the next place, it requires an answer to be filed, which is subsidiary to the purposes of the plea. Ib. § 670. See also 1 Barbour, Ch. Pr. b. 1. c. 6, § 4, p. 115; *Coxline v. Graham*, 2 Paige, 177; *Robinson v. Smith*, 3 Paige, 222; *Mitchell v. Lenox*, 2 ib. 280; *Smets v. Williams*, 4 ib. 364; *Hall v. Noyes*, 3 Bro. C. C. (Am. ed. 1844,) 489, and notes.

## (2) Stat. 43 Geo. III. c. 140.

was to be made to the Plaintiff, he was repeatedly assured by the Clerks of the Company, that regular and correct accounts were kept of the stone, dug out of the Plaintiff's land.

The Defendant put in a plea; stating, that neither the said Bristol Dock Company, nor the Defendant, nor any clerks or clerk, agents or agent, of the said Company, on behalf of the said Company, ever promised said Plaintiff, that any account should be kept by the said Company of the quantities of the stone, which had been or should be \* raised and taken up by or for the [\* 264] said Company out of said Plaintiff's quarry, in said Bill mentioned; or that the said Plaintiff should be paid for the same, according to the value thereof, at the fair market price of such sort of stone: or to that effect; and therefore the Defendant pleads the matters aforesaid in bar of said Plaintiff's said Bill; and prays the judgment of the Court therein.

Mr. Leach, Mr. Bell, and Mr. Toller, in support of the plea, argued, that the Bill in all respects stated a case for the exclusive jurisdiction of a Court of Law; except the agreement to account for the stones in question. Independently of the suggestion of such an agreement the Bill was to all intents and purposes a declaration in an action of trespass; and no ground is laid for the interposition of a Court of Equity: but the plea negatives the agreement; a Court of Equity therefore cannot interfere: but the Plaintiff must be left to pursue his remedy at law.

Sir Samuel Romilly and Mr. Johnson, for the Plaintiff, contended, that this is no more than a plea of *non assumpsit*; putting in issue the whole, that is depending between the parties: viz. whether there was any contract, under which the stone was taken.

Mr. Leach, in reply, said Lord Thurlow in the case of *Hall v. Noyes* (1) retracted his opinion, expressed in *Newman v. Wallis* (2); where the reasoning has no application to this case.

The Lord CHANCELLOR [ELDON].—The original opinion of Lord Thurlow was, that the negative plea was bad: and there ought to be an affirmative \* plea; stating, who was heir. [\* 265] His Lordship changed his opinion afterwards; on the ground, that the Defendant, though he could prove, that the Plaintiff was not heir, might not be able to prove, who was the heir (3).

In this case my opinion is, that the plea is bad; since it does not contain a negation of the alleged accounts having been kept by the Company. If the accounts had been kept by the Company, that would have been evidence before a Jury of such an agreement as

(1) 3 Bro. C. C. 483.

(2) 4 Bro. C. C. 143.

(3) *Ante*, vol. xi. 302, 5; *Drew v. Drew*, *Chamberlain v. Agar*, *Evans v. Harris*, 2 Ves. & Bea. 159, 259, 361; *Hitchins v. Lander*, Coop. 34; *Armilage v. Wadsworth*, 1 Mad. 189; *Sanders v. King*, *Yorke v. Fry*, 6 Madd. 61, 65; 2 Sim. & Stu. 277; *Thring v. Edgar*, 2 Sim. & Stu. 274; *Beames*, Pl. Eq. 123.

that stated in the Bill; and therefore it was not sufficient for the Defendant merely to deny the agreement having been entered into.

The Plea was over-ruled (1).

THE right of a plaintiff to the relief which he seeks may, perhaps, rest upon one material fact; but when, as evidence of that fact, several collateral facts are charged by the bill, it is not sufficient for the defendant to deny the substantive fact; he must also meet the collateral facts. A negative plea will not protect a defendant from the discovery of a variety of *circumstances* charged, which, if discovered, would establish the fact in issue: *Evans v. Harris*, 2 Ves. & Bea. 364; *Sanders v. King*, 6 Mad. 65; and see, *ante*, notes 2, 3, to *Jerrard v. Saunders*, 2 V. 187; and note 1 to *Bayley v. Adams*, 6 V. 586.

### WATSON, *Ex parte* (2).

[1809, JUNE.]

BANKRUPT praying to supersede his Commission on the ground of infancy, left to his Action; having traded two years as an adult; and the creditors resisting. *Feme covert*, living apart from her husband, and holding herself out, and contracting debts, as a *feme sole*, not entitled to summary relief; but left to her Plea of coverture, [p. 266.]

A PETITION was presented by a bankrupt; praying that the Commission might be superseded, on the ground, that he was under the age of twenty-one years at the time it issued (3).

Mr. Cullen, for the Petitioner.

Mr. Fisher appeared on the behalf of the petitioning creditor; who was ready to consent to the prayer of the Petition.

Sir Samuel Romilly and Mr. Hart, on behalf of the assignees, opposed this Petition, and mentioned *Ex parte Keck*, recently decided.

[\* 266] \*The Lord CHANCELLOR [ELDON].—As it appears in this case, that the petitioner held himself forth to the world as an adult *sui juris*, and traded in that character, and contracted debts to a considerable amount for two years previous to the Commission, and as this petition is opposed on the behalf of the creditors, I will make no Order; but leave the bankrupt to bring his action at law (4); if he shall think proper so to do. I consider him no more entitled to any favor or assistance than a *feme covert*, who lives apart from her husband, and holds herself out as a *feme sole*, and contracts debts, is entitled to any summary relief from the Judges at Common Law; who always leave a woman of that description to make the

(1) See *Evans v. Harris*, 2 Ves. & Bea. 361; *Bayley v. Adams*, *ante*, vol. vi. 586, and the note, 596.

(2) *Ex relatione*.

(3) *Ex parte Barwis*, *ante*, vol. vi. 601, and the note.

(4) See 2 Christ. Bank. Law, 17, 18.

best she can of her plea of coverture in any action brought against her ; and constantly refuse to interfere so as to afford her any summary relief.

AN infant can neither sue out a commission of bankrupt, nor will a commission taken out against him be of any legal validity : see, *ante*, the note to *Ex parte Barrow*, 3 V. 554 : but infancy confers no privilege of cheating : *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 489 ; *Earl of Buckinghamshire v. Drury*, 2 Eden, 72 ; *Cory v. Gertcken*, 2 Mad. 50 ; and certainly an infant who has been guilty of fraud, will be entitled to no summary interference of equity in his favor.

### WHEELER, *Ex parte* (1).

[ROLLS.—1809, Nov. 15.]

ORDER, appointing a guardian without a reference only where the property is excessively small. Refused, where it amounted to 1500*l*.

THE Petition prayed an Order for appointing a guardian, without a reference to the Master, on the ground, that the property of the infants did not exceed 1500*l*.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT] made the usual Order for a reference to the Master ; observing, that he had never made an Order for appointing a guardian without a reference \* to the Master, except in cases where the property was excessively small (2). [\* 267]

The following cases were cited by Mr. Fisher, in support of the Petition : *Theys and Cornwall*, 13th November, 1799, where the fortune was 1000*l*. ; *Ex parte Lloyd*, 17th June, 1800 ; *Ex parte Townlow*, 25th February, 1801 ; *Ex parte Coss*, 6th August, 1802 ; all which were cases of guardians appointed without reference, on account of the small amount of the infant's property.

THE rule laid down in the principal case was acted upon in *Ex parte Janion*, 1 Jac. & Walk. 396.

(1) *Ex relatione*.

(2) *Ex parte Janion*, 1 Jac. & Walk. 395. Order, appointing a person to act as guardian, the father being alive, *ante*, *Ex parte Mountfort*, vol. xv. 445.

## ECHLIFF v. BALDWIN.

[1809, August 4.]

INJUNCTION restraining vendor, Defendant to a Bill for specific performance, from conveying the legal estate.

THE Bill prayed the specific performance of an agreement for the sale of an estate to the Plaintiff.

Mr. *Newland*, for the Plaintiff, moved for an Injunction to restrain the Defendant, the vendor, from conveying the legal estate in the premises; on the ground, that the Plaintiff might be thus put to expense by the necessity of making another party, when the cause might be just ready for hearing.

The order was made accordingly.

THE practice pursued in the principal case was also followed in *Curtis v. The Marquis of Buckingham*, 3 Ves. & Beat. 168.

[\* 268]

## GARN v. GARN.

[ROLLS.—1809, DEC. 6.]

SURRENDER supplied for younger children, the heir having a provision under the Will, without regard to the amount.

WILLIAM GARN by his Will, dated the 17th of December, 1808, devised to John Garn, his younger son, some copyhold premises in Cheltenham, to him, his heirs and assigns for ever; to be taken by him in full of his right, title, and interest, to the testator's other property, whether situate in Cheltenham, or elsewhere; and all the rest, residue, and remainder of his real and personal property, whether freehold, copyhold, collegehold, or otherwise, the testator gave, devised and bequeathed, to his two daughters Mary and Elizabeth, and to their heirs and assigns, as joint tenants; subject to the payment of the sum of 300*l.* to his daughter Ann Lewis; and also subject to the payment of 5*l.* per annum, to his grand daughter Sophia Garn, the daughter of his deceased eldest son William Garn.

The Bill was filed by John Garn, the younger son of the testator, to have the want of surrender applied.

Mr. *Cooke*, for the Plaintiff, said, it is now perfectly settled by the case of *Hills v. Downton* (1), that in those cases where a provision is made for the heir, the Court does not consider the *quantum* of that provision; but will supply the surrender.

(1) *Ante*, vol. v. 557; and the note, iii. 68.

Mr. *Lewis*, for the Defendant, the customary heiress, admitted, that this case could not be distinguished.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] made the Decree ; considering the question clearly settled.

A SURRENDER to the use of a testator's will is no longer necessary to give validity to his testamentary disposition of copyhold property : see the statute 55 Geo. III. c. 192.

### LONGMAN v. WINCHESTER.

[\* 269]

[1809, Nov. 23.]

INJUNCTION against pirating a Court Calendar: the individual work creating Copyright; though the general subject, as in the case of a map, or chart, is common (a).

A MOTION was made to dissolve an Injunction against publishing a work, called the Imperial Calendar.

The Bill filed, in July 1809, by a number of persons, above five represented, that they were proprietors of a work, published November 1808 ; containing lists of the Houses of Peers and Commons, &c. having above twenty years ago agreed to consolidate three distinct works of a similar nature, viz. the Royal Calendar, the London Calendar, and the Court and City Register ; of which they were respective Proprietors ; but that in order to preserve their separate rights, it was farther agreed, that the work should be divided into three parts ; and published under such three several titles.

The Bill farther stated, that the Defendant in May last published a work of a similar description under the title of the Imperial Calendar ; containing the same lists ; and wholly copied from the Plaintiffs' work ; setting forth a variety of instances ; including some remarkable errors ; which were exactly followed in the latter work.

The answer stated, that since the original work, published in the year 1661, (which was produced in Court) several works of the same description had been published, that the Imperial Calendar contained the whole of the lists, that were in the Plaintiffs' work, with a great many additions and corrections, and sixty-five pages of entire new

(a) For the cases illustrating this point, see, *ante*, note (b) *Cary v. Finden*, 5 V. 24.

In *Clayton v. Stone*, decided in the Circuit Court of the U. States, at New York, December, 1828, it was held, that a price current, published in a semi-weekly newspaper, was not a *book*, within the Act of Congress, because not a work of science or learning, but of mere industry. 2 Kent, Com. 380, note. This decision is far from being in harmony with the principal case, or with other decisions. In *Wetmore v. Scovell*, 3 Edwards, 515, the Vice-Chancellor refused to exercise the power to prevent the publication of private letters of business, when they possessed no attribute of literary composition.



matter, and twenty-one pages of matter, so entirely different in the contents and arrangement, that they may be considered as [\* 270] new; \*and various alterations of lines, and differences of names, amounting at least to four thousand three hundred words more than were in the Plaintiffs' work; that the said additions and alterations were made by the Defendants at great labor and expense. They denied, that the Imperial Calendar was copied from the other; admitting, that several parts thereof, particularly those in the Bill mentioned, are, some *verbatim*, and others with slight variations, copied from the Plaintiffs' Book, except as to the new matter; and that a part of the Defendant's work is printed from parts of the Plaintiffs': so far as each is the same: but not otherwise: but, as the Plaintiffs copied their lists from some of the said preceding works, submitting, that the Defendants had a right to cause such copy to be made; as copying a work, not original, but containing lists and notes, common to every one, desirous of making an improvement in the same. They admitted, that the price was the same; and submitted, that the Plaintiffs have no exclusive right, and the Defendants have an equal right to publish the said lists.

It was admitted, that nine of the Plaintiffs were joint Proprietors with the Defendants in their work; and the consequence, that they could not remain Plaintiffs.

Sir *Samuel Romilly* and Mr. *Bell*, for the Defendants: Mr. *Hart* and Mr. *Fearnley*, for the Plaintiffs.

The LORD CHANCELLOR [ELDON].—I cannot go the length of stating the proposition, that copyright cannot subsist in a work of this description: nor would I disturb the Injunction upon that ground without putting them to a trial. Assuming, that there may be a copyright, there is not much difficulty in the rest of the [\* 271] case. \*Take the instance of a map, describing a particular county; and a map of the same county, afterwards published by another person: if the description is accurate in both, they must be pretty much the same: but it is clear, the latter publisher cannot on that account be justified in sparing himself the labor and expense of actual survey, and copying the map, previously published by another. So as to Patterson's Road Book, it is certainly competent to any other man to publish a book of roads; and if the same skill, intelligence and diligence, are applied in the second instance, the public would receive nearly the same information from both works: but there is no doubt, that this Court would interpose to prevent a mere re-publication of a work, which the labor and skill of another person had supplied to the world. So in the instance, mentioned by Sir Samuel Romilly, a work, consisting of a selection from various authors, two men perhaps might make the same selection: but that must be by resorting to the original authors, not by taking advantage of the selection already made by another. In the case of *Hogg v. Kirby* (1) there was no doubt, that any person might pub-

(1) *Ante*, vol. viii. 215.

lish a work of the description, which was the subject of that Injunction: each party might publish his own collection; and the articles might happen to be the same: but the one could not excite the public curiosity by copying into his work from that of the other. The Defendant in that case had not done that: but he published a Number of a work, as a continuation of the Plaintiffs' old work; taking the credit, which had been acquired by that, to his own; and that he was not permitted to do.

The question before me is, whether it is not perfectly clear, that in a vast proportion of the work of these Defendants no \* other labor has been applied than copying the Plaintiffs' [\* 272] work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim & literatim*. To the extent, therefore, in which the Defendant's publication has been supplied from the other work, the Injunction must go: but I have said nothing, that has a tendency to prevent any person from giving to the public a work of this kind; if it is the fair fruit of original labor: the subject being open to all the world: but if it is a mere copy of an original work, this Court will interpose against that invasion of copyright.

The Injunction was accordingly granted; restraining the Defendants from copying and publishing the Plaintiffs' work (1).

SEE, *ante*, the notes to *Cary v. Faden*, 5 V. 24, as the cases in which courts of equity will lend their interference in restraint of literary piracy.

## STAPYLTON v. SCOTT.

[1809, JULY 5, 14, 21.]

PURCHASER not compelled to take a doubtful title (a).

No objection to a purchaser, that the defect of title appeared on the abstract, delivered before he filed his Bill.

AN Exception was taken to the Master's Report in favor of the title of the Defendants to the premises, for the purchase of which the Plaintiff had contracted (2). The objection arose upon the Will of the tes-

(1) *Ante*, *Matthewson v. Stockdale*, vol. xii. 270; *Cary v. Faden*, v. 24; and the note, 26.

(a) See, for a collection of cases in which Courts of Equity have compelled a purchaser, upon their own opinion, to accept a title depending upon questions of great nicety. 2 Sugden, Vend. & Purch. (6th Am. ed.) 121, [180], *et seq.*

But, that Courts of Equity will not compel a purchaser to take a doubtful title, see 2 Sugden, Vend. & Purch. 110, [166]; *ante*, note (a) *Cooper v. Denne*, 1 V. 565; note (a) *Rose v. Calland*, 5 V. 189.

Still mere possibilities, or mere suspicion ending in suspicion, ought not to be regarded. 2 Sugden, Vend. & Purch. (6th Am. ed.) 123, [183]; *Ten Broeck v. Livingston*, 1 Johns. Ch. 357.

(2) *Stapylton v. Scott*, *ante*, vol. xiii. 425.

tator John Nicholson; devising his undivided moiety or half part of the dwelling-house, &c. and all his other shares, proportions and interest, if any, in the premises to the Defendants upon trust to sell.

[\* 273] \*The Lord CHANCELLOR.—This is certainly a very singular description by a person, persuaded, that he had the entirety of the premises; and at least imports a doubt, whether he had the entirety, or not. By the evidence before the Master the cause of that doubt was accounted for. There is no circumstance in the evidence, showing, that he had not the entirety; and, if he had, the words are sufficient to pass it. I therefore think the opinion of the Master in favor of the title right: but the question remains, whether upon the conjecture, that this is a good title, a Court of Equity should compel a purchaser to take it. I will give my opinion upon that when the cause comes on for farther directions.

*July 14th.* The cause came on for farther directions.

Mr. *Richards*, Mr. *Hart*, and Mr. *Bell*, for the Plaintiff, insisted, that the doubt was thrown upon the title by the testator himself, under whose Will the estate was offered for sale; and the Court could not protect or indemnify the purchaser against the claim of the proprietor of the other moiety; if it was not in the testator; as appeared from the Will; though it was not ascertained, where it was.

*July 21st.* The Lord CHANCELLOR [ELDON].—The habit of this Court formerly was, not to refuse the Decree for a specific performance, upon the ground, that the title was doubtful. The Court, relying on its own opinion in favor of the title, would not [\* 274] admit any doubt, \*detracting from the value of that opinion; and the notion was very generally entertained, that the true way of getting rid of the difficulty, arising from any doubt, was by an Appeal to the House of Lords. The course has however varied entirely; and it has been held repeatedly, that, though in the judgment of the Court the better opinion is, that a title can be made, yet, if there is a considerable, a rational, doubt, the Court has not attached so much credit to its own opinion as to compel a purchaser to take the title; but leaves the parties to Law. The first modern case of that sort was, I believe, *Shapland v. Smith* (1); in which Mr. Hett differed from Baron Eyre; and the opinion of the former was confirmed by Lord Thurlow; who how-

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(1) 1 Bro. C. C. 175; *ante*, *Cooper v. Denne*, vol. i. 565, and the note, 567; 4 Bro. C. C. 80; *Lowes v. Lush*, xiv. 547, and the references, 548, note; and xi. 463, note; *Biscoe v. Perkins*, 1 Ves. & Bea. 485; see 495. In *Sloper v. Fish*, 2 Ves. & Bea. 145, Sir Wm. Grant, M. R., observes, that this was not first introduced by Ld. Thurlow; but is at least as old as Sir Joseph Jekyll's time; and was repeatedly acted upon by Lord Hardwicke. See the references in the note, 149.

ever felt the doubt so forcibly, that he refused a specific performance; and unquestionably in many instances since that time it has been refused, where there was reasonable doubt upon the title.

The doubt in general cases has been, not of the same nature as this, but upon matter of law respecting the title: yet, if there is as rational a doubt, whether in this instance the testator had the entirety of the premises, as if the title was affected by an objection of Law, I cannot see the ground for a different principle. Considering this question, first, generally, without the special circumstances, it appears, that the testator, John Nicholson, who became the owner of the entirety in 1781, made his will in 1801; devising these premises by express description as one undivided moiety; and, instead of describing the other moiety, he devises all his other shares, proportions and interest, if any; not asserting, that he has any, to trustees to sell; and it appears by a subsequent instrument, on \* which however I do not lay much stress, that the same [\* 275] description followed in each of those subsequent conveyances. Taking the principle to be that a purchaser shall have a reasonably clear title, can this be so represented? Admitting, that it may be explained by extrinsic circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied, that it is not.

Upon the special circumstances, it was contended, that this is an agreement, not for the entirety of the premises, but for such interest only as the testator had: but that is not the true construction; and the point was properly abandoned. The next consideration is, whether, the Plaintiff having an agreement for the entirety, and having also, before he filed his Bill, the abstract, with the special description of the title, the circumstance of his filing such a Bill with that knowledge, is to bind him in equity. Even if the abstract had shown, that the vendors had no title, according to the practice he might file the Bill; and the blot, appearing upon the abstract previously, is not a circumstance, that will prevent a specific performance, if he chooses to have it (1). Upon the whole I cannot decree a specific performance.

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SEE, *ante*, the notes to *S. C.*, 13 V. 425.

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(1) *Jenkins v. Hiles*, *ante*, vol. vi. 646, and the note, 655.

## COWELL v. SIMPSON.

[1809, JULY 26, 28.]

Solicitor's lien on papers superseded by taking security (a).

Vendor's lien for the purchase-money: lien upon goods in different trades for work upon them, for the general balance; and as to the effect of taking security (b).

Factor's lien, both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So, in various trades (c), [p. 280.]

Attorney cannot be changed without leave of the Court: whether he can relinquish the Suit, though not paid, and as to the effect of taking security, *Quere*, [p. 281.]

Effect of his notice to Defendant not to pay over money under a Decree or Judgment without satisfying his Costs, [p. 282.]

BRYAN EDWARDS died in the year 1800; indebted to his Solicitors Richard and Robert Shawe for business done and otherwise to a considerable amount. The Defendant, being one of his executors, [\* 276] employed Messrs. Shawe in the affairs of the executorship as Solicitors, and also as his own Solicitor. In October 1800 he confessed a judgment as executor for the amount of their demand; but he had not possessed assets, subject thereto, sufficient to discharge it. In 1808 they sent in their bill; and the Defendant gave them two notes, payable with interest three years after date: one dated the 1st of October, 1807, for 371*l.* 18*s.*: the other, dated the 1st of October, 1808, for 705*l.* 18*s.* 6*d.*

The Bill was filed against the Defendant, as executor, for an account; and the Defendant, wishing to employ another Solicitor, applied to Messrs. Shawe for his papers; offering to pay the sum of 82*l.* 0*s.* 9*d.* the amount of their bill, delivered for business done subsequent to the settlement in 1808: but they declined to deliver the papers without payment of the money, secured by the Judgment and

(a) As to the lien of attorneys and solicitors, W. W. Story, *Contracts*, § 330; *Story, Agency*, § 383; *Hollis v. Claridge*, 4 Taunt. 807; Montagu, *Lien*, b. 1, pt. 4, ch. 3, p. 59-67; 2 Bell, *Comm.* § 796, (4th ed.); ib. p. 111-114, (5th ed.)

The lien of an attorney or solicitor extends in England to all moneys received, and judgments recovered, and costs taxed, for his client, subject only to any deductions, which the other party may have a right to, by way of cross-costs, or set-off. The practice in the United States is probably variable, being governed by local practice, or by statutory provisions. *Story, Agency*, § 383.

(b) The effect of taking security, and the nice distinctions of our law, are considered, *ante*, note (b) *Nairn v. Prowse*, 6 V. 752.

It is greatly to be regretted that the English Jurisprudence has not followed out the plain and convenient rule of the Roman Law, that the taking of any security, or giving any credit, was an extinguishment of the lien. 2 *Story, Eq. Jur.* § 1226, note.

(c) A general lien is admitted to exist with regard to factors. It is said to arise, either from the usage of the particular trade, or from a special agreement of the parties, or from the habit of dealing between them. *Story, Agency*, § 384.

How the lien may be waived or lost, *ibid*, § 366-370; *Piesch v. Dickson*, 1 *Masson*, 9.

the notes ; though the Defendant has not since the Judgment possessed assets, and the notes are not payable.

A Motion was made by the Defendant, that on the payment of 82*l.* 0*s.* 9*d.* Messrs. Shawe may deliver up on oath all deeds, books, papers, &c. belonging to the Defendant ; insisting, that by taking the personal security of the Defendant for the other demand, they had relinquished their lien.

Mr. *Bell* and Mr. *Horne*, in support of the Motion.—The question is, whether a Solicitor, who takes a security, thereby exempting his bill from taxation, and obtaining interest, does not forfeit his lien ; which is a disadvantage in this respect, that it prevents the claim of interest. The principle is, that by taking a security the \*right by the general Law, not founded on the special [\* 277] contract, is gone ; and, these being negotiable securities, they may have received actual payment.

Sir *Samuel Romilly* and Mr. *Hart*, for the Solicitors.—This application involves a question of great importance to Solicitors ; and the doctrine, carried to this extent, is new. The existence of this lien in general cases being perfectly established, by what reason or analogy can it be lost, by taking a security of an inferior nature ; constituting a mere debt by simple contract ? As no instance can be produced, this must be maintained upon general principles ; but it is inconsistent with all the doctrine with reference to liens, both legal and equitable. A mortgage, or an express pledge, by writing, is not invalidated by taking another distinct security : neither is the lien, not raised by express contract, but resulting out of the Law of this Court, as the vendor's lien for the purchase-money (1), affected by the addition of another security : unless there is an express agreement, or the nature of the security shows the intention, to rely on it exclusively. The rule, now set up, instead of advantage to the public, would produce great injury. Can any Solicitor be expected to give this indulgence to the client, taking a note, payable in three years, if the loss of his lien is the consequence ? If, not being paid, he relinquishes the suit, that does not bind him to deliver up the papers. There is no authority for such a rule ; nor would the public derive advantage from it ; as the Solicitor, if he was under the necessity of proceeding to the end of the suit on credit, or of forfeiting his lien, would always require previous security. It is not suggested, that there was even an understanding, when these securities were given, that the lien should be relinquished ; and \*the inference is the other way : as they are to remain the [\* 278] Solicitors of the Defendant. The cases of lien at Law upon goods for the labor applied to them depend on the custom of the trade. A dyer, for instance, taking a security, settles the account up to that day ; and discharges the goods ; and the lien, which he had by the custom of the trade.

In the case of *Clock v. Bamfield*, at the Rolls in 1802, the De-

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(1) *Mackreth v. Symmons*, ante, vol. xv. 329.

pendant from time to time settled his Solicitor's bills; and gave security by bond. The Solicitor proceeded to do more business; taking other securities. An application was made, as of course, by petition, that the Solicitor should deliver all his bills from the beginning; and that on payment of what was due the papers should be delivered up; which was ordered accordingly. The Solicitor afterwards petitioned; representing, that the Order was surreptitiously obtained: and insisting, that the bills, for which securities were given, were not liable to taxation; and under that Petition an Order was made, discharging the former Order with Costs.

The Lord CHANCELLOR [ELDON].—This is a question of extreme importance and considerable difficulty; and I should have felt great relief, if I had found the case before the Master of the Rolls a precedent: but it has no application to this. It is now very well settled, that if an estate is sold in this Court, and nothing more passes, the vendor, though he has conveyed the estate, has a lien for the purchase-money (1). The older cases with reference to this particular species of transaction seem to have aimed at this distinction; which I collected, as borrowed from the Civil Law; that [\* 279] a security for the \* money puts an end to the lien: the special contract superseding the implied contract: but there are many decisions in this Court against that. I am not sure however, that the doctrine as to vendor and purchaser will apply to this case. I remember being in some degree distressed at finding, with regard to questions of lien as to other property, not real estate, a great deal of doctrine, undisturbed, that by taking a security the lien was given up; and the express contract determined the implied one.

Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and farther, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions, that by taking a security the lien is gone, even with regard to the goods in his possession; and cannot accompany that special security: which determines the implied contract. It is necessary to see, upon what principle that stands. I rather think, it is not regulated by the usage of trade. It has been accounted for in this way; that the lien is gone by the effect of the intention to substitute the special contract for the implied one: the necessities of mankind requiring, that the goods should be delivered for consumption, it is not to be presumed, that the lien was to be extended through the whole period; which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have however heard that denied; and it has been put upon a rule of Law, that the special contract removes the implied one: but, if that is the ground, this case would deserve much consideration. The Solicitor taking

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(1) See, *ante*, *Mackreth v. Symmons*, vol. xv. 329, and the references.

a security, which has three years to run, as the client may have occasion for his papers, there is as much reason, that the lien should not accompany the security through that \* period, [\* 280] as in the instance of a trade: and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists.

*July 26th.* The Lord CHANCELLOR [ELDON].—I regret, that this Motion is made at a period, when I cannot have the assistance of the Judges. With regard to the doctrine of lien in this Court as it affects the purchase-money of an estate sold, I have stated what occurred to me in the case of *Mackreth v. Symmons* (1); which is now the subject of a re-hearing: but my opinion is not, that this case is to be decided by analogy to that part of the doctrine of lien: that doctrine having been applied much farther in the instance of the purchase of an estate, whatever doubt was originally entertained upon that transaction, than in any other case.

The practice with regard to the lien of an Attorney upon papers (2) is not very ancient. Lord Mansfield (3) states that expressly; and that he had argued the question in the Court of Chancery; and Sir James Burrow mentioned the first decision, which established it in a Court of Law by analogy to other cases of lien. Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate, with reference to which it has in a series of decision been extended, it may be described as *prima facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades \* the demand [\* 281] being for work and labor, applied in some instances upon the particular goods, in others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other. The exigencies of mankind requiring the goods to be delivered for consumption, the implication from an engagement for security of an engagement to deliver the goods without payment is necessary: otherwise from a promissory note, payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So, in this instance, if the Solicitor says, he will not proceed in the business, and will not deliver up the papers, the consequence is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact, that he has taken this security, you

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(1) *Ante*, vol. xv. 329.

(2) Beames on Costs, 310, &c.

(3) Doug. 104.



can imply, that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract.

I do not enter into the question, whether he was obliged to go on, farther than to observe, that a client at law cannot change his attorney without leave of the Court (1) ; and there is no mutuality, if the attorney has an absolute discretion to relinquish the cause. Suppose a sum of money declared to be due by Decree or Judgment : it is \*clear according to the established rule of lien and the practice, that the Attorney may give notice to the Defendant not to pay the money, until his costs are satisfied. How can that lien be consistent with a special agreement to give credit for three years, receiving interest ? He must either abandon that contract ; or claim under it, and his lien also ; insisting, that notwithstanding that contract he will not permit the Client to receive the money for three years. The proposition, that the lien can exist after such a special contract necessarily involves a contradiction to that contract.

My opinion therefore is, that, where these special agreements are taken, the lien does not remain ; and whether the securities are due or not, makes no difference. The case at the Rolls has no application. Business has been done by the Attorney during a course of years. At a particular period a security was given ; and afterwards the residue of the money was paid. A second settlement took place ; and the balance was secured by bond, payable in 1801. There was no demand beyond that bond except 11*l*. The bond became due : and under those circumstances a Petition was presented, not disclosing those facts ; praying a general taxation of the Bills ; which could not possibly be due. To make that case similar to this the application should have been previous to the time, when the bond was due ; submitting, whether, as a bond had been given, though it was not due, the lien could remain.

The Order was made accordingly, that on payment of 82*l*. 0*s*. 9*d*. the Solicitor should deliver up the papers, belonging to the Defendant either in his own right, or as executor (2).

1. As to the *lien* for the amount of his purchase-money, which, unless he has waived it specially, every vendor retains on the estate that he has sold, see, *ante*, note 2 to *Ex parte Hunter*, 6 V. 94 ; and note 3 to *Austen v. Halsey*, 1 V. 476.

2. In *Stevenson v. Blakelock*, 1 Mau. & Sel. 543 (where the principal case is noticed), Lord Ellenborough observed, he took the general rule of law to be, that, where there is an express antecedent contract between the parties, no *lien*, growing out of an implied contract, can ever arise. And the same Judge, in *Chase v.*

(1) See *Merrewether v. Mellish*, *ante*, vol. xiii. 161 ; and the note, 162.

(2) See, as to this lien, *Ex parte Sterling*, *ante*, 258 ; and the note, 259. In *Stevenson v. Blakelock*, 1 Mau. & Sel. 535, the Court of King's Bench seems not perfectly satisfied with *Cowell v. Simpson* : but it was confirmed by the Lord Chancellor on *Stevenson v. Blakelock*, being cited in *Brydger v. Brydger*, 17th of April, 1815, in Chancery. *Mss.* ; Mr. Beames.

*Westmore*, 5 Mau. & Sel. 186 (again adverting to the principal case), draws this line of distinction:—where a person who would otherwise have been entitled to a *lien* growing out of an implied contract, enters into a special contract for a particular time or mode of payment, he thereby relinquishes his right to exercise his *lien* in any way which would be inconsistent with his special contract: but a stipulation, fixing the amount of the price or reward which a workman, who is about to bestow his labor upon a chattel, is to receive, does not oust the right of *lien*, and the workman may detain the chattel until the price is paid. To justify the common law right of detainer, it is not necessary there should be no manner of contract between the parties, except such as the law implies; it is only requisite there should be no actual contract inconsistent with that common law right. These doctrines do not appear by any means irreconcilable with those laid down in the principal case; Lord Eldon, however, in *Balch v. Symes*, Turn. 92, intimates that the Court of King's Bench had expressed a doubt whether his decision in *Cowell v. Simpson* was right; but, his lordship added, notwithstanding such doubt, he still remained of opinion, that an attorney who takes a security abandons his *lien*, though the rule would not apply to sums not covered by the security, as to which the *lien* must be considered as remaining.

3. When it was said, in the principal case, that a factor has a *lien* upon goods in his possession, not only for his expenditure and demands in respect thereof, but also for his general balance upon former transactions, probably, such former transactions as were connected with his employment as factor, were alone alluded to. In *Houghton v. Matthews*, 3 Bos. & Pull. 494, it was judicially observed, there are two species of *liens* known to the law,—namely, particular *liens*, and general *liens*. Particular *liens* are where persons claim a right to retain goods in respect of labor or money expended upon them, and these *liens* are favored in law. General *liens* are claimed in respect of a general balance of account, and these are founded in custom only, and are, therefore, to be taken strictly. If, in any particular case, a custom, establishing a general *lien*, be made out, it may prevail, as it did in *Ex parte Deeze*, 1 Atk. 229: but (it was added) there is no authority for the position that a factor may retain goods in his hands in respect of all debts whatsoever; and there is a rule of law which appears to be decisive of the contrary, namely, that nothing can fall within the custom of trade but what concerns trade; from which it should seem necessarily to follow, that collateral money obligations are not within the custom which authorizes a factor to retain for a general balance due to him in that capacity. The decisions upon questions of this kind have, in many cases, been principally founded upon the evidence given of the usage of the particular trade in respect of which they arose; and that such evidence has by no means been uniform, see *Green v. Farmer*, 4 Burr. 2222; *Olive v. Smith*, 5 Taunt. 60. In *Walker v. Birch*, 6 T. R. 262, the general rule of law, that a factor has a *lien* on the goods deposited with him for the general balance due to him from the depositor, was not disputed; but it was held in that case, as the goods there in question were deposited for a particular purpose, and the factor received them on those terms, the right of *lien* was waived.

4. With respect to the *lien* of a solicitor upon papers which have come into his hands, and the qualifications of that doctrine, see the notes to *Taylor v. Popham*, 13 V. 59. And that the *lien* of solicitors, of course, commenced only when the whole business of the court ceased to be conducted by the six clerks, see *Barker v. Dacie*, 15 Ves. 280; *Gardner v. ———*, 17 Ves. 387.

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## MOODY v. WALTERS.

[1809, JULY 21, 22, 25; AUGUST 4.]

TRUSTEES to preserve contingent remainders joining in a Recovery held with reference to the circumstances and occasion no breach of trust.

Limitation to a child *en Ventre*, [p. 296.]

Generally, trustees joining to destroy the contingent remainders, before the tenant in tail is of age, a breach of trust, [p. 307.]

*Quasi* intail of an estate for lives barred by release, [p. 313.]

THIS cause arose upon a Bill, praying the specific performance of a contract for the sale of an estate in the county of Nottingham to the Defendant; by whom an objection was taken to the Master's Report approving the title.

The Abstract stated indentures of lease and release, dated the 28th and 29th of April, 1693, previous to the marriage of William Levinz and Anne Buck; by which Sir Creswell Levinz, and William Levinz, his son and heir apparent, conveyed to Samuel Buck and Gilbert Wigmore and their heirs; to hold to them and their heirs after the marriage to the following uses: as to certain premises to the use of the same trustees, their executors, &c. for two hundred years, without impeachment of waste; and, as to the other premises, to the use of William Levinz for ninety-nine years, if he so long live, without impeachment of waste, with remainder to Sir John Lowther, Sir William Juxon, and John Creswell, and their heirs, for the life of William Levinz, in trust to preserve the contingent remainders, therein limited; but to permit him to receive the rents, &c.; and after the determination of that estate, as to certain premises to the use of Anne Buck, if she should survive her intended husband, for her life, for her jointures, and in bar of dower; and, after the determination of that estate, to the use of Sir William Lowther, Sir William Juxon, and John Creswell, and their heirs, during the life of Anne Buck, to preserve contingent remainders; and after the determination of the said respective estates, as they should respectively cease [\* 284] and determine, as to all the \* premises, to the use of the first and other sons of the marriage in tail male; with remainder, in case William Levinz should die without leaving any issue male, then born and alive, and leaving his wife with child, to such after-born child or children, if a son or sons: remainder to William Levinz, brother of Sir Creswell Levinz, for one hundred and twenty years, if he should so long live: remainder to the same trustees to preserve contingent remainders: remainder to his first and other sons in tail male: remainder to Sir Creswell Levinz in fee.

The issue of the marriage was one son, William Levinz, who attained the age of twenty-one in 1734; and three daughters: one of whom died unmarried.

The Abstract farther stated, that by indentures of bargain and sale,

dated the 15th of November, 1734, William Levinz the elder, William Levinz the younger, Sir William Juxon, son and heir of the said Sir William Juxon, deceased, and John Ellis, devisee in trust of Sir Creswell Levinz, conveyed to John Launder and his heirs; to hold to him and his heirs, to the intent to make him a tenant to the præcipe, in order for a recovery; to enure to the use of William Levinz, the father, for life, without impeachment of waste: remainder to William Levinz, the son, in tail general and to the right heirs of the father; with power to the father and son jointly, or the survivor, to revoke the uses; and to sell; or declare new uses, as to the premises, or any part. A recovery was suffered accordingly.

By another Instrument, executed in the same year, William Levinz, the father, and his son conveyed to trustees, for a term of years, upon trust to provide maintenance and a portion for Mary Levinz, one of the daughters; of the other two one being married, the other dead \*unmarried. In 1749 or 1750 the estate [\* 285] was sold; but previously several other deeds were executed, which are particularly mentioned by the Lord Chancellor in his judgment; creating charges, subject to which the estates were limited to the sum for ninety-nine years, or for life, with remainders to his issue.

The Plaintiff was seised in fee under conveyances and devises, derived from this title. The objection to the title was, that Sir William Juxon, the heir at law of the surviving trustee for preserving the contingent remainders in the settlement of 1693, had been guilty of a breach of trust in joining with William Levinz the elder, and William Levinz the younger, in the deed of November 1734, for making a tenant to the præcipe for, suffering a recovery of the estate, and thereby destroying the remainders, limited by the settlement of 1693; unless the Plaintiff could show, that William Levinz the younger, was dead without issue; and that there was also a failure of issue male of William Levinz, the nephew, of Sir Creswell Levinz; and also, that Sir Creswell Levinz did not by his Will dispose of the reversion in fee.

The Answer stated the Will of Sir Creswell Levinz, dated the 24th of February, 1699, devising the reversion of the Nottingham estate, with other estates, to John Ellis and other trustees, subject to certain charges, in trust for his son for life; with remainder to such son of his, and the heirs male of the body of such son, as his said son should by any writing under hand and seal, with three witnesses, appoint; and, for default of appointment, to the first and other sons and the heirs male of their bodies; and for default of such issue, to the nephew William Levinz for life and his first and other sons in tail male; and for default of such son and sons of his said son and nephew, and the heirs male, &c. then in trust as to the reversion of all the premises, as well in Nottingham- [\* 286] shire as Bedfordshire and Oxfordshire, for his nephew John Clarke for life and his first and other sons in tail male; with

several other similar limitations ; and the ultimate remainder to his own right heirs.

The Answer stated, that it does not appear, that William Levinz the son, and William Levinz the grandson, of Sir Creswell Levinz, died without issue male ; that the Plaintiff has not given evidence, that William Levinz, the nephew of Sir Creswell Levinz, died without issue male ; or that all or any of the persons, to, or in trust for, whom the reversion was given by the Will, were dead without issue male, when the deed of 1734 was executed : or that they are now dead without issue male.

The Lord CHANCELLOR [ELDON] expressed a doubt upon the effect of the contingent limitation to a posthumous child of William Levinz, his son, upon the event of his death without leaving male issue, (which event did not happen, as he left a son, who afterwards died without issue,) whether any estate vested under the subsequent limitations. The cause was however permitted to proceed.

Mr. *Richards* and Mr. *Daniel*, for the Defendant, the Purchaser, in support of the Exception.

Upon general principles it is extremely difficult to support the act of trustees to preserve contingent remainders, concurring to destroy them ; and a purchaser from them with notice of the breach of trust clearly cannot hold against those, who claim under the trust. A marked anxiety appears in the Will of Sir Creswell Levinz to keep the estate in the male line of the family ; and on failure of that line to reserve to himself the ultimate disposition. Against [\* 287] this apparently plain breach of trust the length of time will be relied on, which has elapsed since : the recovery, suffered so long ago as 1734, and the sale of the estate in 1749 ; and it will be insisted, that it is too late for a Court of Equity to give assistance to any person, interested under the settlement. Under the circumstances of this case a purchaser incurs considerable danger ; and if there is any doubt, he shall not be compelled to take the title (1). Reasonable evidence ought to be given of the failure of the issue, who would have been entitled under this settlement ; and of the several persons and their issue male, to whom estates were limited by the Will of Sir Creswell Levinz, subsequent to the settlement. No account whatsoever is given of these persons : the title stands merely upon the recovery, in 1734 : but the length of time may be explained by absence abroad, or disability.

With regard to the question, whether this is a breach of trust, such an act has been so held in many cases : particularly *Mansell v. Mansell* (2) : a precise authority for the general doctrine. The distinction between a voluntary instrument, as a Will, and a conveyance for valuable consideration, was there disregarded ; and the contingent remainder was replaced by the Decree against those, who claimed under the breach of trust. It is true, there are cases (3), in

(1) *Slaplyton v. Scott*, ante, 272 ; *Cooper v. Denne*, vol. i. 565, and the note, 567.

(2) 2 P. Will. 678 ; For. 252.

(3) *Winnington v. Foley*, 1 P. Will. 536 ; *Platt v. Sprigg*, 2 Vern. 303.

which the Court ordered the trustees to join : but it is extremely difficult to maintain, that a person, charged expressly with the duty of preserving an interest, shall upon his own notion of what is right contribute to destroy it : an act, which cannot be reconciled with legal or honorable principles. The authors of the settlement have fixed the rule for the conduct of the trustees : that they shall in no case, except that of tenant in tail in \*possession, permit alienation. [\* 288] They are placed in that situation for the purpose of protecting the son against the influence of his father and his own filial affection ; and that protection is to be extended to his posterity, and to all the interests, directed by the settlement or Will to be preserved. That is the sound principle. The author of the Settlement, not exceeding the rules of law, is the only judge of the convenience ; and the Court is to give effect to his object ; not to make a Will or Settlement for him. In the case of *Townshend v. Lawton* (1) the Court refused to compel the trustee to join ; that not being within the principle of *Winnington v. Foley* (2) : but the authority of the Court to make such a Decree in given cases, viz. for the benefit of the family, was recognized. Mr. Fearne (3) goes to the extent, that in no case ought the trustee to preserve remainders join in defeating them, except by the authority of this Court. The conclusion is, that they ought not, unless for some purpose beneficial to the family.

In this case the object was to provide for the male line of the Levinz family in the utmost extent : the issue male of the nephew of Sir Creswell Levinz being in the order of limitation next to those of his son ; and all the female descendants of both passed over entirely. This object is entirely defeated by the act of the trustees : the deed to lead the uses of the recovery providing the means of alienation by a power to revoke the uses, and to sell, or declare new uses. The son, it is true, having become tenant in tail in possession, might have suffered a recovery : but he did not. Taking no step himself, after his estate tail vested, to destroy the remainders over, he must be considered as \*equitable tenant in [\* 289] tail at the time of his death ; and it cannot be maintained, that by the event of his attaining that period, at which he might have suffered a valid recovery, that recovery, which was originally bad, became perfect.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiff : Mr. *Martin*, for other Defendants.—This title is perfectly free from objection. The Plaintiff claims under a conveyance by William Levins, the son, executed at a time, when, if the trustees had not before interposed by assisting him to acquire the absolute dominion over the estate, taking care in that act to make a provision by a term for the daughter, the only other issue, he might by his own act have acquired it. The purchaser, with a perfectly good legal estate, apprehends danger from

(1) 2 P. Will. 379 ; Sel. Cas. Ch. 71.

(2) 1 P. Will. 536.

(3) 1 Fearne's Copt. Rem. 479.

this supposed breach of trust ; of which there has been no complaint for seventy-five years. The questions are, first, whether the transaction in 1734, if immediately disputed, could have been considered a breach of trust : if so, secondly, whether, supposing there was issue male of William Levinz still existing, or lately extinct, and that other remainder-men had left issue male, who could have complained of it, it would be possible for any of them at this period, and considering the conveyance of 1749, to complain of it.

The proposition, that this act was a breach of trust, is not supported by either decision or *dictum*. No Judge has yet stated that ; and it is denied in the case of *Else v. Osborn* (1). In several cases, particularly *Barnard v. Large* (2), it is stated, that these trusts [\* 290] are in the consideration \* of a Court of Equity honorary trusts ; and the intention is, that the trustees shall exercise their judgment, whether, when the son has reached the proper age, viz. that, at which the law entrusts him with his property, it is right, that he and his father should join in barring the entail, for the benefit of the family : either that there may be a new settlement ; to provide for other branches of the family ; or that the estate may be sold ; which may be greatly for their advantage. In the case of *Barnard v. Large* the limitations were the same as these ; and the Bill to compel the trustee to join in a recovery was dismissed. The same doctrine was laid down by Lord Kenyon, when Master of the Rolls, in *Lord Lansdown's Case* ; which, having been heard by consent privately, is not reported ; and Lord Kenyon mentioned the case of *Else v. Osborn* with approbation ; though in *Mansell v. Mansell* (3) it was considered, by Lord Raymond only, according to the Reporter's note (a), as dissatisfactory. The case of *Mansell v. Mansell* could not admit of doubt : trustees wilfully joining to destroy the remainders, which they were bound to support. *Winnington v. Foley*, and other cases prove no more than that under some circumstances the Court will not, and under others will, interfere to compel them to join in barring the remainders : but there is no authority for punishing such an act under circumstances like these ; and there are on the other hand the opinions of Lord Harcourt, Lord Hardwicke in *Woodhouse v. Hoskins* (4), Sir Thomas Sewell, and Lord Kenyon, that it must be left to the discretion of the trustees in what case to join, and where to refuse : a discretion beneficial and necessary for many family purposes, generally more properly determined *in foro Domestico*. The result of the authorities is collected by Sir [\* 291] \* Thomas Sewell in *Barnard v. Large* ; that where the trustees are called upon to join, for the purpose of a new settlement, upon the marriage of the eldest son, making the tenant in tail tenant for life and continuing, instead of destroying, the object of the settlement, in such cases, generally, the Court will compel

(1) 2 Vern. 754 ; 1 P. Will. 386.

(2) 1 Bro. C. C. 534 ; Amb. 774.

(3) 2 P. Will. 683.

(4) 3 Atk. 22.

them to join : also in some cases, though not for that purpose, but under some particular distress, or other special circumstances : but, generally in all other cases, where instead of the ordinary limitation to a tenant for life, it is to the husband for a term of years, if he shall so long live, with remainder to trustees during his life to preserve contingent remainders, the Court will leave it to the discretion of the trustees ; implying the intention to interpose persons, who might prevent the effect of the father's influence.

In this case, if the complaint had been recent, the answer was clear ; that the trustees, having that discretion, exercised their judgment honorably : the estate under these limitations : no provision made for female issue : and there being a daughter. Considering themselves, according to Lord Harcourt as trustees for the tenant in tail, having attained the age of twenty-one, by which event their trust was substantially determined, they reasonably thought it advantageous for the son, instead of running the chance of surviving his father, under the old limitation, to have an estate in tail general after an estate for life in his father ; with the sole power of revocation, &c. unless the joint power should be executed ; purchasing that interest by making a provision for the daughter, the only other issue ; which he was not bound to do. Under such circumstances this act was never treated as a breach of trust. The circumstance, that the Court has refused to interfere, leaving the trustees to exercise their discretion, is the strongest evidence \* to the con- [\* 292] trary ; and the mere circumstance, that they have exercised their discretion, as the Court would not, cannot have such a consequence. The only question is, whether it is exercised *bona fide* ; from honest motives ; or with a corrupt view of benefit to one branch of the family at the expense of the others.

If a complaint against this transaction, made recently, could have been maintained, can it be now supported by imagining persons, who may be in existence ; and could any such persons now complain ? None of the descendants of William Levinz, the son, who suffered the recovery, could complain of it. Neither could any of the other persons in remainder, if his issue failed. No person could complain in equity ; as the complaint ought to have been made, when the defective transaction might by another act have been confirmed. In the year 1749 William Levinz, then tenant in tail in possession, might have acquired the absolute estate. The answer to those, who impeach this title, is, that they lay by : permitting him to understand himself to be owner of the estate ; when, if the objection had been brought forward, he would have immediately by a recovery remedied the effect. Though perhaps there is no authority immediately in point, the principle of this case is applicable : an equity of redemption being entailed, with remainders over, the mortgagee, having filed a bill of foreclosure, instead of proceeding to an absolute decree, took from the tenant in tail a release of the equity of redemption : it was held, that all the remainder-men were bound



by that; upon the principle, that if the objection had been taken, they would have been properly barred: *Reynoldson v. Perkins* (1).

The rule that a purchaser shall not be compelled to take [\* 293] a doubtful title, has never been carried to the extent, \* now urged. That is confined to objections, depending upon difficult questions of Law; upon which the Court has considerable doubt: but it is not sufficient to say, that some individual feels doubt, arising from excess of caution in advising upon the title. Certainty to a common intent is sufficient: and no title could stand such scrupulous investigation. Here is no serious doubt.

Mr. *Richards*, in reply.—The question is, not whether this act was a breach of trust, which must be admitted; but whether it was such a breach of trust, that the Court would charge the trustees; or follow the estate; in order to bring it back to the old limitations. All the cases treat it as a breach of trust: in some instances to be punished; in others not; according to the circumstances; sometimes even directed by the Court: and the cases of that last description clearly show, that it is considered as a breach of trust: indemnifying the trustees for the act, which, to give effect to the true object, they are called upon to do. That is the result of the doctrine, as it appears in *Barnard v. Large*; that it is a breach of trust *prima facie* to destroy the contingent remainders: but the Court has interfered, to give effect to the object of the original settlement; and perhaps would not punish the act, if consistent with the rule, which the Court, if called on, would have adopted; and would protect the trustee. All these however are cases of exception.

Aug. 4th. The Lord CHANCELLOR [ELDON].—It is agreed on all sides, that a good legal title to this estate can be made. The question is, whether under the circumstances that title, good at [\* 294] law, will also be a \* good equitable title; or, putting it in another shape, whether there was in the year 1734 such a breach of trust committed in the execution of the conveyance of that date, that, supposing any person, descended from the son of Baptist Levinz, that person could now, allowing for all incapacities of infancy, or otherwise, claim under the instrument, executed in the preceding century; and insist in this Court, that there was that sort of breach of trust, upon which I can say at this day, that the equitable estate belongs to him; however good the legal title might be in the vendor; and without going into all the particulars, that might constitute the equitable title, I will for the purpose of this question suppose, that a person does exist, who might raise the question, notwithstanding the lapse of time.

I cannot trace the transmission of all the premises through the different deeds; but will for the purpose of the question look at the case as carrying in the transmission of the title all the premises under the first instrument through the several deeds, some way or

other, down to 1749 or 1750 ; when they were parted with by the family ; which is a material circumstance. It is not improper to consider what might have been the effect of a suit at many intermediate periods ; as the question would be different, according to the period, at which the suit might have been instituted : if for instance, I found the estate settled in strict settlement previously to the agitation of a question of this sort in Court.

About the period of 1693, when this settlement was made, the practice of limiting an estate to trustees to preserve contingent remainders was well known. It had prevailed long before ; and in the mode of that provision the estate was limited to them in various ways. If the father was tenant for life, then the mode was a \* limitation from and after the determination of that [\* 295] estate by forfeiture or otherwise to trustees and their heirs during his life, upon trust to preserve contingent remainders ; but nevertheless to permit him to receive the rents and profits ; making them trustees during his life of the freehold ; if by forfeiture or other determination his estate ceased to exist : that arrangement making him first tenant for life, then the trustees tenants for his life ; with a legal remainder to the first and other sons. Another mode is by limiting the legal estate to trustees for the life of the father, in trust for him ; with a legal remainder to his first and other sons ; and then, as the legal and equitable estates could not unite, he and his son could not suffer a recovery.

It is material to consider, not only what is the Equity under the actual limitations in this case, but also what would be the doctrine in these two cases : the one, where the father is not tenant of the freehold : but the trustees are tenants of the freehold in trust for him during his life : the other, where the father is tenant for life, but, his estate by forfeiture or otherwise ceasing, the immediate legal estate goes to the trustees, but in trust for him : whether in those two cases, as in the one the trustees had an estate for the express purpose of preserving contingent remainders, and in the other the legal estate was vested in the trustees, if the same act had been done, upon which this suit is instituted, it could be considered a breach of trust : that is, if, when they originally had the freehold in them, or in the other case, not having it originally, but acquiring it by the determination of the estate of the tenant for life before his death, they join with the tenant in tail, when of age, in suffering a recovery, they are guilty of a breach of trust. That must, I conceive, be the consequence, if they would be so held in the case, which I am about to \* mention ; as in each of these [\* 296] cases their estate is expressly to preserve the remainders.

This settlement not making the father tenant for life, or giving the trustees the legal estate for his life, but giving to the father for ninety-nine years, if he shall so long live, with remainder to trustees to preserve contingent remainders, &c. the effect is, that the trustees take an immediate estate for his life, subject to the father's interest for ninety-nine years, if he should so long live, upon a trust to per-

mit him to receive the rents and profits, and to preserve the contingent remainders to the first and other sons of the marriage, &c.

A limitation then follows, which I never before saw in any of these ancient instruments. Before the Statute of Will. III (1) there was a mode of limiting to a child *en Ventre*; or rather, of limiting an intermediate estate to persons in existence, until a child *en Ventre* should be born. The known mode is in some degree different from the course, that has been taken in this settlement; in which the limitation to an unborn child is introduced thus: that if the said William Levinz shall depart this life without leaving any issue male then born and alive, and leaving his wife with child, and if such after-born child or children shall be a son or sons, &c.

According to the plain meaning an after-born son would not have been a son to take under the former limitation to the use of the first and all other sons; as there would have been no occasion for a limitation to an after-born child, if that previous limitation would have operated as a limitation to him; and there is one singular [\* 297] circumstance: assuming, that the after-born child \* would not take under the prior limitation, as it is declared, there is no limitation to an after-born child, if there was any son, previously born, who survived William Levinz; the limitation to preserve the estate for an after-born child being to take effect only, if there was no child of the former description, or issue of one, living at the death of William Levinz: yet if there was, there might also be a posthumous child, who would not have taken under that limitation. In this clause the case of twins must have been contemplated.

There is considerable doubt, whether in the event this subsequent limitation to the issue of William Levinz, the brother of Sir Creswell, ever took effect; as, if the limitation to the posthumous son would not take effect, William Levinz, the son, having left a son living, it seems monstrous to hold, that the limitation to the nephew would take effect, though the previous limitation to the posthumous son would not. If therefore this had been the only question, depending upon this instrument, and it had been a Will, not a Deed, I have so strong an opinion, that this limitation in the event never took effect in the nephew, that I would rather have disposed of it by a case, than, against my own impression from these words, conclude, that the limitation to William Levinz the nephew, did take effect. The fact is, that William Levinz the son did not die without leaving issue male; as it is admitted, that there was a son living at his death. The case however is supposed not necessarily to turn upon that: but the purchaser may contemplate it with some degree of satisfaction.

The premises, conveyed by the Deed of the 15th of November 1734, I take to be all the premises, described in the former settlement; and for the purpose of raising the question I shall [\* 298] consider the several instruments as \* carrying forward, or

(1) Stat. 10 and 11 Will. III. c. 16.

at least finally collecting together the whole of the premises under such title as existed in 1749 or 1750. The effect of the Deed of November 1734, and the recovery, suffered in pursuance of it, is, that the father, who had been tenant for ninety-nine years, became tenant for life; and the son tenant in tail general, instead of tail male: but under the original limitation, supposing the estate to have remained in the trustees during the life of his father, who was tenant for years, the son by levying a fine might have acquired a base fee; amounting to the power of alienation, as long as his issue male should endure; putting the estate under all the inconvenience, that would have been the effect of a fine, barring his own issue; though not the remainders. By enlarging his estate to a remainder in tail general he acquired no other power by way of alienation, except that the estate he could have acquired by a fine would endure, while he had any issue; not confined to the existence of issue male; and under the new settlement he could not suffer a recovery without the co-operation of his father; as before he must have had the concurrence of the trustees during his father's life.

Powers of very considerable importance are given: to the father and the son, or the survivor, to revoke the uses, and sell the premises, or declare any new uses as to the premises or any part: enabling not only the son, but the father, if he should be the survivor, to sell by executing the power, limited to him alone in that event.

What were the circumstances, that led to the recovery, what the demands on the prudence of the father and the son, what the occasions of the family to be served, we are not informed, nor can we collect otherwise than by attending to instruments, that appear to be contemporaneous, and may in a sense be represented as part of the \*same transaction. If immediately after the [\*299] recovery a Bill could under the effect of the first Deed have been sustained by the issue of William Levinz the nephew, it would have been of great consequence to ascertain the whole purpose; all the occasions, and views, with reference to which the trustees to preserve contingent remainders joined in that recovery. The facts are, that in the same year another instrument was executed; by which the father and son conveyed to trustees; upon trust to raise an annual maintenance for Mary Levinz the daughter, unprovided for; and on her marriage with consent of her father 2000*l.* as a portion; and, subject to a term for that purpose, the estate was limited to William Levinz, the father, for ninety-nine years, if they both so long live: with remainders to William Levinz the son, and the heirs of his body, and to the father in fee. Then the father conveys premises to the son for ninety-nine years, if he so long live, &c.; and a fine was levied to give effect to this conveyance.

Whether in this Deed the old power of revocation was reserved, or not, I cannot collect; but I apprehend it must have been; forming my opinion upon the supposition, that it was; as otherwise it is very difficult to conceive, how the title was got in as to these prem-

ises by the subsequent deeds: William, the son, being tenant for ninety-nine years only.

This transaction, to the extent, in which it makes a provision for the son and the daughter, manifests some family purposes in the object of the recovery, suffered in the same year. A great variety of subsequent instruments were executed; especially in 1737 and 1738; and it is material, that in most of them, the immediate object being to create charges, the limitations, subject to those charges, are considerably varied: in some being to the son for ninety-  
[\* 300] nine years: \* in others to him for life: in all with remainders to his first and other sons: to the heirs of his body; and to his father in fee: so that the actual limitations by those instruments, long previous to the sale, so far as the family were to take, are varied in this respect; that, instead of the limitation to the son in tail general, as in the settlement of 1734, it is to him either for ninety-nine years, or for life, with remainders all through his issue male, and to his father in fee; subject as to some to the same powers as in the Deed of 1734; but as to others to very different powers: for instance by a Deed, dated the 20th of June, 1738; and in some other instruments the powers of revocation and limitation of new uses are given not to the father and son jointly, and to the survivor, but to them jointly, and to the son alone; if he should be the survivor.

I remark this circumstance; which applies to several other Instruments; as I apprehend, if a question of this sort, a breach of trust, is raised, it must be as against those, who have the legal title from time to time in that period, in which the question is raised. If, for instance, a breach of trust in 1734 is alleged, the effect of that statement is, that those, who took the legal estate, would themselves be trustees: but, attending to the principle, that governs these cases, the questions are very different, whether the Court would relieve at the instance of a remote remainder-man, finding the estate in 1734 limited to uses, amounting to a plain breach of trust, then complained of; and where the legal estate is at the time of the complaint made accompanied by such an equitable estate, as, if originally created, would have been held a due execution of the trust to preserve contingent remainders. If the Court has any discretion, there is a wide distinction between interposing upon a breach of trust in

1734, or when that breach has been so reformed by sub-  
[\* 301] sequent \* conveyances as to place the beneficial interest under such circumstances, as, if it had been originally so settled, would not have furnished a just subject of complaint in a Court of Equity. A material view therefore of this case is the consideration, how the title stood, not only in 1734, but from time to time since.

Under the effect of all these instruments, giving estates in mortgage, creating portions and charges, with notice of this breach of trust, if it can be so described in 1734, all having clear notice of the original title, in 1749 or 1750 the estate was sold: but previously

William Levinz the father, died: leaving this son, his only issue male: the only person therefore within the consideration of the original settlement; as far as they are considerations of marriage, or arising out of the wife's portion. That son is since dead without issue. As to the subsequent remainders, I take it as admitted, that some person may exist, who can now complain, as he might have complained before of this breach of trust; and the objection to the title is, not that the trustees might not have joined in a recovery for some purposes, but that the purpose is to be collected from the instruments executed, as limiting the uses; that the Court is neither at liberty, nor has the means, of inquiring, why those uses were limited, such as they are, in that Deed of 1734: but they must be taken to be such as they are from the Deed, then executed.

In this view of the circumstances the case appears to be, that the trustees have joined in a recovery, limiting the uses of an estate, the contingent remainders in which they were bound to preserve, to the father for life, to the son in tail general, and to the father in fee; with a power, to be exercised by them jointly, or by the survivor solely; and no purpose appearing upon the contemporaneous \* Deed, except to make a provision for the son, and [\* 302] present maintenance and future portion of his sister, unprovided for by the settlement: all the subsequent mortgagees having notice: the purchaser of 1749, or 1750, having notice, and also of the instruments, creating those different limitations, which carry the estate to the issue male of the son successively, subject to the power of the father and son jointly, or of either surviving, in some instances, in others of the son alone, to revoke those uses, altering the son's estate in tail general to an estate for life, with remainder to his sons in tail: the purchaser also having notice of the equitable title under the subsequent remainder, which the trustees were bound to preserve; who therefore could follow the estate into the hands of the present vendor.

Under such circumstances it is clear, that this Court has never yet acted upon this, when done, as a breach of trust. I do not say, there may not be a case, in which it would be so treated; but I have not found the actual case in which the Court has upon that principle interfered: I mean, where the limitations were such as they are under in this Deed of 1693; the first son, having attained the age of twenty-one; and joining; as cases, where the father is tenant for life, or ninety-nine years, and no issue is born, or the first tenant in tail has not attained the age of twenty-one, are not cases of this kind. The first case is *Davies v. Weld* (1), in 1683; and from that date during nearly the period of the transaction in this cause, questions upon this subject were much agitated. What was done finally in that case I cannot trace: but it was impossible to maintain, that there was not a breach of trust; as there can be no

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(1) 1 Vern. 181; 1 Eq. Ca. Ab. 386.

doubt, that, if before the birth of a son the trustee thinks proper to join, he would be answerable to the son, afterwards coming \* into existence ; and so would a purchaser with notice.

[\* 303] It is rather surprising, that precedents should have been required ; or that the notion of finding them should have staggered the Chancellor of that day.

The next case is *Platt v. Sprigg* (1) : a singular decision ; upon this ground ; that a mortgage having been made, previous to the marriage settlement, the mortgagee might have filed a Bill of Foreclosure ; and if he had brought before the Court the person, who was tenant of the inheritance at the time, though under a limitation subsequent to the estate of the first son of the marriage, and a foreclosure had been decreed, that first son, afterwards born, would have been barred : but, the sale producing more than was due upon the mortgage, the whole surplus was so much real estate gained for the uses of the settlement. The principle therefore, upon which the sale of the settled estate was established, is, not, that the trustees might join in destroying the uses : but that the best execution of their trust was by preserving by the use of their powers over the estate as much property as would be preserved by their permitting the sale, and laying out the surplus of the money, produced by it, in land to be again settled. By that course the principle of the trust for preserving the uses was followed up, though in form it appeared to be destroyed.

The case of *Pye v. George* (2), in 1710, has not much application. The doctrine, as there stated, is, generally speaking, true : it is true in a case of the destruction of contingent uses before the birth of a son ; and how far it is true, as applied to a trust, understood as created to preserve all contingent uses, subsequent to the birth of the \* first tenant in tail, actually

[\* 304] twenty-one, must be determined upon subsequent authorities ; as, though it seems to be a doctrine, that ought to be accepted, that the trustees should preserve all the uses, it is unquestionable, that this Court has absolved them for having destroyed some contingent uses ; and has not blamed them for destroying others.

In the case of *Topping v. Piggott* (3) the opinion of the Lord Chancellor seems to have been, that, not only the first, but all the other sons were persons, whose remainders were to be preserved ; but not the heirs of the body or the right heirs of the husband : but the subsequent cases seem to break in upon the doctrine, as there stated, so far as it throws a shield over the interest of the second and other sons.

In the case of *Frewin v. Charleton* (4), determined by Lord Harcourt, who delivered the doctrine in *Pye v. George*, the father was by his marriage settlement tenant for ninety-nine years, if he should

(1) 2 Vern. 303.

(2) 1 P. Will. 128.

(3) 1 Eq. Ca. Ab. 385, pl. 2.

(4) 1 Eq. Ca. Ab. 386, pl. 2.

so long live ; with limitations in remainder to trustees during his life to support contingent remainders, and to his first and other sons successively in tail male ; with a provision for daughters, as in this settlement of 1693, in the event of no issue male ; being to arise only by the execution of a trust term subject to the limitations to the sons. Lord Harcourt thought himself at liberty to direct, that the father and the trustees should all join in a recovery to defeat the uses of the settlement, as to all the children except the eldest son ; as he was of age and about to marry ; but that he should not have that advantage, unless he would make a provision for his sister ; bringing forward the term for that purpose, as if it had stood originally in \* the order of limitation prior to his [\* 305] estate tail. The trustees were therefore ordered for the sake of the first tenant in tail to join in destroying all the subsequent limitations ; where all the issue were within the consideration of the settlement.

In the case of *Basfet v. Clapham* (1), in 1717, Sir Joseph Jekyll at first refused, but, a precedent being shown, finally decreed, that the trustees in a voluntary settlement should join to destroy the contingent remainders, upon the bill of creditors, claiming under a subsequent conveyance in trust for the payment of debts. In the same year Lord Cowper determined *Else v. Osborn* (2) : a material case upon this head of doctrine. The turn of Lord Cowper's reasoning is, that, if the eldest son, claiming under the usual limitation in strict settlement, joined, that would prevent any breach of trust : but, the remainder after the father's estate for ninety-nine years, if he should so long live, being to the heirs of his body, the eldest son therefore taking, not as eldest son, strictly, but as heir of the body, his concurrence was that of a person who might never take ; as the event proved ; and for the same reason the Bill by the second son could not be maintained ; as he might never be the heir. This reasoning seems to admit what I cannot make consistent with the doctrine of former or subsequent cases ; importing, that, if the eldest son, claiming under a limitation to him by that description, and having attained the age of twenty-one, had joined, that would prevent the breach of trust.

That was followed by *Winnington v. Foley* (3), in 1719 ; in which the trustee was decreed to join. Mr. Vernon cited *Sir Thomas Tippling's Case* ; and said, there was a \* later case, which I have not been able to find, where the trustee against the [\* 306] consent of the father joined with the first son, the remainder-man in tail, in a recovery ; and yet it was held no breach of trust : Lord Macclesfield observing, that it was plainly for the benefit of the family ; as by the intended settlement the son was to be but tenant for life, instead of tenant in tail : so that it was the means of preserving the estate longer in the family : also that, the mother being

(1) 1 P. Will. 358.

(2) 1 P. Will. 386.

(3) 1 P. Will. 536.



dead, there was an end of the contingent remainders by that marriage; and, as to any remainders by another marriage, no remainder, not *in esse*, ought to be so much regarded as that remainder in tail, actually vested in the son.

Suppose, instead of looking to a more remote estate, this cause had arisen upon the Bill of a son by a second marriage of William Levinz, the nephew, the limitation by the settlement of 1693 being to his sons by any marriage, Lord Macclesfield would have said, that remainder was not to be so much regarded as the estate tail actually vested in the son; and that argument would apply with full as much force to the nephew as to the son of a son, whose marriage was the consideration of that settlement.

If in the case of *Winnington v. Foley* the infant was to be considered a trustee for all the contingent remainders, equally, and could not make a conveyance to destroy them, being, as an infant, either incapable of judging of the propriety of any family arrangement, or, if capable, not having by law the power to carry it into effect, that was a very strong decision; that, as it was for the advantage of one individual, having a vested remainder, and being of age, that those contingent remainders should be destroyed, that effect should be produced by an arrangement, with the sanction of the Court, though the infant could execute no instrument.

[\* 307] \* In the case of *Townshend v. Lawton* (1), in 1726, Lord King, assigning his reason for refusing to decree the trustee to join, that he would not take away any man's right, declares, that he would make the Decree in such a case as *Winnington v. Foley*. With all deference is not that taking away a right; though in a less degree? If there could be no recovery, as the infant could not join, is not the right of the second son taken away by converting him into a remainder-man, subject to all the limitations, to be inserted in the proposed settlement on the marriage of the eldest son, which might in various events operate considerably to the prejudice of the second? That amounts therefore to an acknowledgment, that for the benefit of the first remainder-man in tail the subsequent right would be taken away. The conclusion is, that the Court assumes, as the general trustee in these cases, a discretionary exercise of the legal right of the trustee to join, or not; and it is remarkable, that the Decree in *Townshend v. Lawton* orders the father and son specifically to perform the covenant with the Plaintiff; though they could not do so, unless the trustee would join.

The case of *Mansell v. Mansell* (2) has no immediate application, where the father is tenant for ninety-nine years if he so long live; with remainder to trustees to preserve contingent remainders; and cannot be represented as breaking down the distinction of former cases; but it establishes the general doctrine, that a breach of trust is committed by joining, before the tenant in tail is of age; but

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(1) 2 P. Will. 379.

(2) 2 P. Will. 768; For. 252.

does not decide, what the Court will do, where trustees, so interested, join for the benefit of the family, or for any purpose, if the first tenant in tail has attained the age of twenty-one.

\* In *Symance v. Tattan* (1), the doctrine is much too [\* 308] generally stated, upon all the authorities, taken together.

I will state the case of *Woodhouse v. Hoskins* (2) from a good note, which I have in manuscript. Sir John Hoskins devised to his son Bennet Hoskins for ninety-nine years, if he should so long live; with remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male: and similar remainders to the second son Hungerford Hoskins, and his first and other sons; with the ultimate remainder to his own right heirs; and powers to revoke, and appoint new uses: provided they should be limited in the same way to the sons. Bennet Hoskins died without issue. Hungerford Hoskins had issue one son, Chandos Hoskins; who attained the age of twenty-one. They borrowed money from the Plaintiff upon bond; and by articles, reciting, that Chandos Hoskins was bound as surety for his father, they covenanted to convey to the Plaintiff, upon trust to sell, to apply the money in satisfaction of their debts, and to pay the surplus to Hungerford, the father. The Bill prayed a specific performance; and that the trustees should join in suffering a recovery; also that the power of revocation may be declared void as to all the remainder-men. Lord Hardwicke in his Judgment observes, that there is no precedent for such a Decree as was prayed by the Bill; that these trustees were often called honorary: viz. whose office gives them a discretion: but since the case of *Mansell v. Mansell* that notion was laid aside: he would not however say, the Court would decree, that the trustees, joining in such a case as was then before the Court, were guilty of a breach of trust; which is a very different question. It was said, this kind of settlement tends to a perpetuity: but though it was formerly very usual, that objection had not been made. The reason certainly is to preserve the estate longer in the family; as, \* if the father was tenant for life, he and the son [\* 309] might suffer a recovery with the trustees; and the father might by influence make the son join. In the present instance the occasion for suffering a recovery was considerable, from the father's debts; and it is probable, that the settlement was made in this manner to guard the son against being drawn in for that purpose. The precedents of decreeing trustees to join in a recovery are not many; and have not gone so far as the present case; but there is a medium between the two propositions. The Court will not always decree a man to do what, if done; probably would not be considered a breach of trust. His reasons and motives would be taken into consideration: but as the trust was probably created to prevent the father and son joining, when the son was of age, to pay the father's debts, it would be too much to make a decree for that purpose.

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(1) 1 Atk. 613.

(2) 3 Atk. 22.

In this judgment Lord Hardwicke expressly and cautiously declares, that he will not say, if the trustees had joined, it would, or would not, have been a breach of trust; judging rightly, that it would not be proper to declare any general principle either way; as, though the son's joining would be *prima facie* in contradiction to the object of the settlement, many cases might be supposed, in which that act might be most beneficial to the son himself.

The case of *Barnard v. Large* (1) is, I believe, printed from a note of Lord Redesdale's; and the result tends very much to establish the principles, laid down by Lord Hardwicke. Sir Thomas Séwell in his judgment keeps up the distinction between decreeing trustees to join, and declaring, if they did, that the act [\*310] would be a breach of \* trust; and cautiously declares, that he will not state, in what cases the act will, or will not, be held a breach of trust.

I shall notice only one other case; which is not in print: *Lord Lansdown's Case*, at the Rolls, before Lord Kenyon: upon which several opinions, and mine among others, were taken: the result of which was, that, upon the circumstances stated, a Court of Equity would not compel the trustees to join: also, that, if they thought, the purposes, to which the family looked in the arrangement, were such as in a fair and reasonable view the trustees would accede to in a settlement of their own, they might safely join. Those trustees however acted with caution; and refused to join. The purchasers in this case also act with propriety in having the opinion of the Court, before they take the title. In *Lord Lansdown's Case* therefore a Bill was filed to compel them to join. The cause was heard privately; and Lord Kenyon held, that he ought not to compel them; and the inclination of his judgment was rather, that it was difficult to say, the Court had ever acted properly in compelling them to join, and that the Court ought not to do so: but he would not say, a case might not arise, in which they would be compelled.

The difficulty turns upon this: whether it can be represented as the object of a suit in Equity to compel trustees to do that, which they ought not to do without a suit; and my notion is, that the act, which they are decreed to do, should be such as they ought to do. On what other principle can a suit be entertained? The proposition, which appears in treatises on this subject, most justly regarded with reverence, that trustees are never to join without the direction of the Court, is the result of great caution; but amounts to this; that the

Judges of this Court are the trustees to preserve all the contingent [\*311] \* remainders in the country; and no one can say, what is to be done, until a Decree has been obtained. If the Court mean to say, trustees to preserve contingent remainders shall never join without a previous direction, that proposition ought to be firmly and boldly stated: otherwise trustees are left exposed to all the vexation, to which the demands of families would make them liable; and to the difficulty of determining, whether a Court of

Equity will direct them to join ; or will interpose more or less to defeat the act ; and make them responsible. That is a situation, in which trustees ought not to be placed ; and upon such terms no person will be very ready to lend himself to the most laudable purposes of family settlement without a previous direction. The principle therefore cannot be, that the absence of that sanction makes the act a breach of trust.

With regard to the questions in this particular case, whether the Court ought to have declared the act of these trustees a breach of trust in 1734, and whether, supposing there are any issue of William Levinz, the nephew, now existing, they could complain now of the breach of trust, committed at that time, I can find no Decree, that considers the act of the trustees, joining for such a purpose, a breach of trust. They in 1734 joined the father and the son to limit the estate to the father for life, instead of ninety-nine years : with remainder to the son in tail general, instead of tail male ; without any remainder to the subsequent issue of that marriage ; celebrated in 1693 ; and the existence of future issue therefore not very probable ; and also without any remainder to the possible issue of any other marriage the ultimate remainder is at once limited to the father in fee ; with this power of revocation, and the subsequent variations of that at a period, when undoubtedly a valid recovery might have been suffered without the trustees ; viz. after the death of the father : \* the immediate purpose being to limit part of the [\* 312] estate in possession to the son, having attained the age of twenty-one ; not appearing to have had any other maintenance ; and giving as Lord Harcourt had done in a much stronger case (1), to the sister maintenance and a portion on marriage : the subsequent object being to raise money, not for the father's debts, but the son's ; and the subsequent limitations all extending the estate to the sons of that son, if any : I admit with the power of revocation, varied, as it is.

Under these circumstances I cannot conceive, that any complaint at this day can bring before me a case, upon which, collecting the purpose from the use, actually made of the recovery in 1734, I should by the application of these doctrines, so little to be reconciled, be driven to the conclusion, that this is, not a case, in which I am called upon to decree a breach of trust, but involving a very different consideration ; whether the trustee is to be made responsible : or that it is by any means probable, that this could against a purchaser be declared a breach of trust on the ground of notice. My opinion is, that I cannot hold that doctrine ; and I say with Sir Thomas Sewell, " Let the Law take place."

I do not go farther than the circumstances of this case require : viz. not declaring this a breach of trust : but, if I had thought it so, another difficulty would remain ; whether there could be any person in existence, who could complain. Though the subsequent remainders may be considered in one sense as in the view of the settler,

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(1) *Frewin v. Charleton*, 1 Eq. Ca. Ab. 386, pl. 4.

viz. in failure of issue of his own son, and notwithstanding the strong anxiety, appearing in the Will, that the estate should go in the male line, I cannot conceive, that the issue beyond [\* 313] that \* of the son is within the consideration of the settlement in that sense, in which the Court has looked to the persons, claiming under such a settlement, for the purpose of giving relief with reference to the subject now before us. The question is very different, where the persons complaining are directly within the consideration of marriage, and where they are merely relations, more or less remote from the owner of the estate, but not directly connected with that consideration. Upon that point it is enough to say, that if a second son of that marriage could have complained in 1734, the consequence is not necessary, that issue, claiming under the more remote limitation, could have complained even in that year.

A circumstance, to be much regarded, is, that the son, even remaining tenant in tail male, clearly might by a fine have given a purchaser an estate, as long as any issue male should endure; and the instant the actual freehold vested in him could by a recovery have barred every one; and then, supposing him, still to have been in Equity tenant in tail male, having the legal fee, could he have been compelled to settle the estates to the old uses; or may it not be argued, that he might have released, as in the case in *Ambler* (1), upon a Bill to foreclose an Equity of Redemption; or, the Case (2) of the *Quasi* Tenant in tail of an estate for lives in the Court of Exchequer; that a release would operate as a recovery; and therefore, though tenant in tail in Equity, he might make himself tenant in fee? There are, I admit, many cases, to which that principle will not apply; as the estate tail must be determined: but in all such cases it is very doubtful whether a Court of Equity would interpose.

[\* 314] \* Another view, in which this case has been put, is, whether there is such a doubt upon this title, that a purchaser should not be compelled to take it. This is not a case of that species. If I had doubt upon the point, I should feel great reluctance in acting upon it; so as to leave in so much uncertainty this very important branch of the law; but, not having that doubt, I am bound to say, first, that this is a good title: next, as to the nature of my opinion, that I have no doubt, whether I ought to make the Decree; admitting, that from the impression of the late cases on my mind I certainly should have advised a purchaser to take the opinion of a Court of Equity.

The exception was over-ruled; and a specific performance decreed (3).

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1. It is one thing to say, that a trustee would have been well warranted in not acceding to an act; and another, that he has done wrong by acceding: *Parkes v.*

(1) *Reynoldson v. Perkins*, Amb. 564.

(2) *Blake v. Blake*, 3 P. Will. 10, Mr. Cox's note (1); *Blake v. Lurton*, Coop. 178.

(3) *Biscoe v. Perkins*, 1 Ves. & Bea. 485.

*White*, 11 Ves. 223. There is a wide distinction between punishing a trustee for joining in the destruction of contingent remainders, and compelling them to join; and the court, in exercising its own discretion upon such subjects, will proceed according to the nature of the trust, and examine whether any implied discretion has been given to the trustees, and whether they have used it properly: *Barnard v. Large*, 1 Brown, 535. In *Biscoe v. Perkins*, 1 Ves. & Beam. 491, Lord Eldon said, that after an anxious endeavor to examine every authority on the subject, he found it a very trying task to deduce from them the true principle. The cases, his lordship added, are uniform to this extent, that if trustees, before the first tenant in tail is of age, join in destroying the remainders, they are liable for a breach of trust, and so is every purchaser under them with notice; but, when we come to the situation of trustees to preserve remainders, who have joined in a recovery after the first tenant in tail was of age, it is difficult to say more than that no judge in equity has gone the length of holding, that he would punish them as for a breach of trust, even in a case where they would not be directed to join. The result is, that it seems to have been laid down as the rule safest for trustees, but certainly most inconvenient for the general interests of mankind, that it is better for trustees never to destroy the remainders, even when the tenant in tail, of age, concurs, without the direction of the court. All the cases, it was added, agree, that trustees of this description are so far honorary trustees, that they cannot be compelled to join in defeating remainders. In *Osbrey v. Bury*, 1 Ball. & Beat. 58, Lord Manners observed, he was not aware of any case which had gone the length of saying that, because the tenant for life of the beneficial estate happened also to be a trustee, such tenant for life would be guilty of a breach of trust in joining with the remainder-man in tail to bar the entail.

2. As to the mode in which a *quasi* tenant in tail of a leasehold estate for lives may bar the remainders over, see, *ante*, note 2 to *Fletcher v. Tollet*, 5 V. 3.

3. A court of equity will not compel a purchaser to accept a title, with respect to the validity of which any rational doubt exists, notwithstanding the better opinion of the court is, that a good title can be made (*Stappylton v. Scott*, 16 Ves. 274); the vendor will be left to such remedy as he may have at law. The rule, as above stated, seems settled: *Sloper v. Fish*, 2 Ves. & Beat. 575; but Lord Eldon, in *Vancouver v. Bliss*, 11 Ves. 465, assigned strong reasons for doubting whether it had been wise to depart from the old practice, according to which the Court of Chancery pronounced the title to be good or bad.

## BLAMIRE v. GELDART.

[ROLLS.—1809, Nov. 30.]

LEGACY at the decease of a person, entitled to the fund, out of which it is given, vested immediately; and payment only postponed (*a*).

JONATHAN ROUNDELL by his Will, dated the 10th of April 1797, bequeathed the following legacies:

"I give and bequeath to Edward How, and his wife Mary my niece or the survivor of them 40*l.*, and also 200*l.* 3 per cent. consols, to be paid them at the end of six months after my decease.

(*a*) Generally speaking, a bequest "after the death" of a particular person, denotes, not a condition that the legatee shall survive such person, but merely the time at which the legacy shall take effect in possession. See, *ante*, note (*a*) *Barnes v. Rowley*, 3 V. 305; 2 Williams, Exec. 866; *Davison v. Hearn*, 1 Russ. & M. 606; *Ram, Assets*, p. 128, ch. 6, § 14; *Dawson v. Killet*, 1 Bro. C. C. (Am. ed. 1844,) 119, 124, note (*a*), and cases cited; *Benyon v. Maddison*, 2 ib. 75.

Also I give and bequeath to Samuel Atkinson, junior, my great nephew 500*l.* 3 per cent. consols at the decease of my wife. Also I give and bequeath to my niece Elizabeth, wife of George Thwaites, 100*l.* 3 per cent. consols at my decease. Also I give and [\* 315] bequeath to \*my nephew-in-law at Seven Dials, London, 200*l.* 3 per cent. consols at my wife's decease. Also I give and bequeath to my niece Pooly Roundell the sum of 50*l.* to be paid in six months after my decease. All the rest residue and remainder of my estate and effects subject to my debts, funeral and other expenses, I give and bequeath to my said wife Jane Roundell."

The testator then appointed his wife Jane, the Reverend James Geldart, and George Pringle aforesaid, joint executors, to manage the property and to fulfil the intentions of his Will; to the two latter of whom he gave and bequeathed the sum of 20*l.* each for their trouble.

The testator died in 1797. George Pringle died in 1800, during the life of Jane Roundell, the testator's widow; who died in 1807. On the 2d of April in that year, the Reverend James Geldart, the surviving executor of the testator, transferred 200*l.* 3 per cent. Consolidated Bank Annuities to the widow and executrix of George Pringle; and also transferred to Atkinson the Stock, bequeathed to him.

The Bill, filed by the executor of Jane Roundell, against the Reverend James Geldart, prayed an account of the residue of the personal estate of the testator Jonathan Roundell; and that the Defendant may be decreed to re-invest the sum of 200*l.* 3 per cent. Consolidated Bank Annuities; and to account for the dividends; and also to pay to the Plaintiff the produce of the other Stock sold by him; or to re-invest the Stock, and account for the dividends.

The Defendant by his answer insisted, that the payment to the executrix of Pringle was proper: the legacy being vested in him; and the payment only postponed.

[\* 316] The Cause stood for Judgment.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—

The cases upon the point, which arises in this cause, are very numerous; and perhaps not all very easily reconcilable with each other: but this case appears to me not to be substantially distinguishable from those in which the words "at" or "after" the death of a particular person, have been held, not to denote a condition, that the legatee shall survive such person, but only to mark the time, at which the legacy shall take effect in possession: that possession being deferred on account of some interest in the subject being given to the person, on whose death the gift is to take effect. In *Medlicott v. Bowes* (1), *Barnes v. Allen* (2), *Monkhouse v. Holme* (3),

(1) 1 Ves. 207.

(2) 1 Bro. C. C. 181. Stated from the Register's Book, *ante*, vol. iii. 208, n.

(3) 1 Bro. C. C. 298.

*Benyon v. Maddison* (1), *The Attorney-General v. Crispin* (2) and many others, the time might be said to be annexed to the substance of the gift just as much as in the present case : but the purpose being to give interests to different persons in succession, it was held, that each gift was alike immediate ; though the second taker could not have the benefit until after the death of the first.

In the present case, if the testator had given the Stock to his wife for life, and at her death to George Pringle, it would have been clear, that he would have had a vested interest in the nature of a remainder. In a Will it is not material, in what order the clauses are arranged. The question is, what is the effect upon the whole. This testator begins by giving to George Pringle the Stock at the death of his wife ; and then gives to his wife the whole of his property. Consequently she has a life-interest in that \* Stock, [\* 317] so given to George Pringle at her death, for it is part of the testator's property not antecedently disposed of. Thus the Will, no matter in what order, divides the fund between these two persons ; giving to one the interest for her life, and to the other the capital at her decease. In effect and substance he took a remainder, which became vested immediately upon the testator's death, and was not defeated by his own death in the life-time of the wife.

The legacy therefore was properly paid ; and the Bill, as far as it seeks to impeach that payment, must be dismissed.

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SEE note 3 to *Malim v. Keighley*, 2 V. 333.

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(1) 2 Bro. C. C. 75.

(2) 1 Bro. C. C. 386.

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IN Michaelmas Term, Mr ALEXANDER was appointed a Master in Chancery, upon the resignation of Mr. ORD.



## IN THE MATTER OF BANKRUPTCY.

[1809, AUGUST 8, TUESDAY.]

GENERAL Order, as to Bankrupts' Certificates.

LORD CHANCELLOR.—Whereas the creditors of bankrupts do frequently prematurely sign their consent to the Commissioners sealing and signing the Certificates of such bankrupts, I do hereby order, that the Commissioners in all Commissions of Bankrupt, which shall be issued from and after the first day of September next, do require, that in all Affidavits exhibited to them, in order to prove the signature and subscription of the consent of the creditors to the Commissioners signing and sealing the Certificate of the bankrupt, the day of the month and year in which the respective creditors signed, and subscribed such their consent, be distinctly stated: AND I DO HEREBY DIRECT, that in order the better to ascertain the precise time, at which the respective creditors shall sign such their consent, the said creditors do respectively, at the time of signing such their consent, write opposite their respective names the day of the

[\* 319] month and year on which they so sign \* the same: AND I DO HEREBY FARTHER DIRECT, that the signature, and sealing of the Certificate by the Commissioners, shall be attested in writing upon such Certificate by the Solicitor to the Commission, or some Clerk of the Solicitor, or by the Messenger to the Commission, or by some Clerk of the Commissioners respectively: And in order to avoid frauds upon the Commissioners, with respect to the said Certificate, I do farther order, that a List shall be made and kept by the Commissioners, or one of them, of all creditors of above (1) twenty pounds, who shall, from time to time, prove their debts, and of the amount of their respective debts, which list, as the same shall, from time to time, be made up, shall be signed by three of the Commissioners: And in order that due notice of this Order may be given, I direct copies thereof to be put up in the Office of my Secretary of Bankrupts.

ELDON, C.

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(1) This should be "not less than."

## IN THE MATTER OF BANKRUPTCY.

[1809, AUGUST 12, SATURDAY.]

GENERAL Order as to Bankrupt Petitions.

LORD CHANCELLOR.—Whereas great mischief has arisen by Petitions being presented in matters of bankruptcy, in the names of persons, who have afterwards either abandoned them, or stated that they had no given authority for presenting such Petitions: *It is therefore ordered*, that from and after the first day of October 1809, *all Petitions* in Bankruptcy presented for hearing shall, before they are presented, be respectively signed by the Petitioners, except in cases of Partnership, or absence from the kingdom; in the former of which cases the signature of one of the Partners is to be deemed sufficient; and in the latter case the Petition is to be signed by the person presenting the same, on behalf of the person so abroad; *And it is further ordered*, that the signature of each person, signing as a Petitioner, shall be attested by the Solicitor actually presenting the Petition, or by some person who shall state himself, in his attestation, to be attorney, solicitor, or agent of the party signing, in the matter of the Petition (1).

ELDON, C.

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(1) Attestation to the petition of a Solicitor on his own behalf dispensed with; *Ex parte Kingdom*, 1 Madd. 446.

## 50 GEORGE III. 1809.

## COCKBURN v. THOMPSON.

[1809, Oct. 31; Nov. 1, 14.]

THE strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient; as in the case of a very numerous association in a joint concern; in effect a partnership (a).

Defect of parties the subject of Demurrer, or Plea; as it appears, or not, on the face of the Bill (b).

Distinction between partners and creditors, and between general and scheduled creditors, by analogy to the rule at law, that a plea in abatement must show the proper party, [p. 325.]

Where it has been held sufficient to bring before the Court the first person having an estate of inheritance, [p. 326.]

All obligors in a joint and several bond, principals and sureties, must be parties, generally. Exception, where the surety is insolvent; or has paid nothing [p. 326.]

Parties, dispensed with for convenience in the first instance, coming in after institution of the suit, must have the opportunity of supporting their interests, rehearing, &c.; a creditor for instance; and, if partner with the debtor, subject to account, [p. 327.]

Generally, a residuary legatee must bring before the Court all persons, interested in the residue. Exception, where not necessary or convenient, [p. 328.]

Various cases, where parties dispensed with; bills by or against some tenants of a manor; as for suit to a mill, &c.: some parishioners for tithes, or a *modus*: societies for insuring each other; which is not within the Stat. 6 Geo. I. c. 18, [p. 328.]

THE Bill, filed by several persons, on behalf of themselves and all others the proprietors of The Philanthropic Annuity Institution, who shall come in, and seek relief by, and contribute to the expense of, the suit, stated the constitution of that establishment, formed in the year 1806, in the first instance of the purchase of annuities for lives with the money, that should be subscribed; providing among other things, that the number of shares should not be increased beyond 50,000 without the express resolution of two Courts of Proprietors.

The Bill farther stated, that the Defendant Thompson was appointed Solicitor, and the other Defendants bankers, to [\* 322] \* the Institution; in which capacities they possessed a

(a) For the rule and exceptions in cases of a multitude of parties in interest, see *ante*, note (a) *Lloyd v. Loaring*, 6 V. 773.

(b) Story, Eq. Pl. § 75, 235, 236, 541.

If the parties, not brought before the Court, are necessary and proper to the decree to be made under the Bill, the exception may also be insisted upon in the answer, or at the hearing. Story, Eq. Pl. § 72, 236, 283, 541; Mif. Eq. Pl. by Jeremy, 180, 181, 326; *Robinson v. Smith*, 3 Paige, 222; *Mitchell v. Lenox*, 2 ib. 281; *Whiting v. Bank of United States*, 13 Peters, 14; *West v. Randall*, 2 Mason, 181; *Mechanics' Bank of Alexandria v. Selons*, 1 Peters, 306; *Hunt v. Wickliffe*, 8 Peters, 215.

large sum of money, belonging to it, amounting to upwards of 10,000*l.*; and that an application for an Act of Parliament, to enable them to accept and grant annuities in the names of trustees, having failed, without which it was impossible to carry the Institution into effect, as from the number of the proprietors a memorial could not be enrolled, according to the Act of Parliament (1), at a General Meeting on the 18th of August, 1808, it was resolved, that it would be for the benefit of all parties to the Institution, that it should be dissolved.

The Bill, then charging several acts, done by Thompson, as a breach of his duty, prayed, that the Institution may be declared dissolved: an account of the sums, received by the Defendants, &c. on account of the Institution, or of any of the proprietors: the Plaintiffs submitting to account for their receipts and payments on account of the said Institution, and pay any balance, which shall be found due from them; that the same, and any balance, which shall be found due from the Defendants, may be paid into Court, &c.; that the rights and interests of the Plaintiffs, and the said other proprietors, who shall come in, and seek relief by, and contribute to the expense of, this suit, may be declared and established; and that Thompson may be restrained from receiving from the other Defendants, and they from paying to him, the money in their hands.

The Defendant Thompson put in a plea to the discovery and relief, sought by the Bill; alleging, that a great number of persons, whose names were stated, are proprietors of The Philanthropic Annuity Institution; and that several other persons, also named, are also proprietors, as the Defendant believes; the Defendant insisting \* on the want of those persons, as parties to the [\* 323] Bill, in bar to the discovery and relief.

Mr. *William Agar*, in support of the Plea, insisted, that according to the strict rule all the persons, interested in this concern, must be parties; citing *Leigh v. Thomas* (2), *Moffat v. Farquharson* (3), *Parsons v. Neville* (4), *Sherrit v. Birch* (5), *Lloyd v. Loaring* (6).

Sir *Samuel Romilly* and Mr. *Fearnley*, for the Plaintiffs, contended, that, besides the common case of creditors, the Court has frequently dispensed with parties; where they were so numerous, that it was impracticable or inconvenient to have them all before the Court: *Chancey v. May* (7), *Adair v. The New River Company* (8); and the cases of *Drury Lane* and the other Theatres; and no inconvenience can arise from considering this as a case of exception: the only accounting parties being the officers of this Society.

(1) Stat. 17 Geo. III. c. 26, repealed by Stat. 53 Geo. III. c. 141; see the note, *ante*, vol. ii. 36.

(2) 2 Ves. 312.

(3) 2 Bro. C. C. 338.

(4) 3 Bro. C. C. 365.

(5) 3 Bro. C. C. 228.

(6) *Ante*, vol. vi. 773.

(7) Pre. Ch. 592, edition by Mr. Finch.

(8) *Ante*, vol. xi. 429.

Sir *William Agar*, in reply.—At what number is the rule, that all persons, interested in a partnership concern, must be parties, to cease? Many of these persons may not have advanced their money; which must be brought into the account; and it may be necessary, according to the usual course, to examine them upon interrogatories. The case of creditors is distinct. The reason of *Adair v. The New River Company* is very special. *Chancey v. May* contradicts the uniform practice since; and the reason, assigned for that decision, is not sound. How can it be represented, \* that the rest were in effect parties? The objection from the impossibility and inconvenience of making all these persons parties occurs equally after a Decree. Lord Kenyon's clear opinion was, that all accounting parties must be before the Court; and Lord Alvanley had great doubt upon the case of a mortgage, split by the mortgagee (1).

The Lord CHANCELLOR [ELDON].—There are some very strong cases upon mortgages. I shall give the Judgment with great consideration in this cause: which is of high importance: going in effect, as it is argued for the Defendant, to this; that with regard to all those Institutions, known to subsist in this great metropolis in the nature of partnership, all Assurance Companies, for instance, if they have not a corporate character, no law can be administered in any Court of Justice among the members of such Societies. Another extremely important effect, if this demurrer can be maintained, will be, that with regard to a great number of charitable institutions, as that of The Society of Widows, before Lord Thurlow, and the late case of The Bakers' Company (2), before me, no law or equity can be administered among the members; who, being to subscribe annually, and divide the profits, are all partners. As to the case of Drury Lane Theatre (3) my opinion was, and still is, that every renter was a partner; being to receive his rent out of the profits; which constituted him a partner; and this distinction between partners and creditors \* must be attended to; in a plea for want of parties, as in the plea of abatement at Law, the Defendant must tell the Plaintiff, whom he should have sued; in the case of scheduled creditors in a deed the Defendant may be able to state, who they are: but in the ordinary case of creditors of a deceased person the Defendant cannot, if I may use the legal expression, give the Plaintiff a better writ; as in the case of partnership he may. Another case is that of persons, entitled to prize-money (4). In the case of the widows, suing for themselves and all others enti-

(1) *Montgomerie v. The Marquis of Bath*, ante, vol. iii. 560. On a Motion, 6th December, 1799, for enlarging the time of payment under that Decree, the Lord Chancellor expressed great doubt, whether it could stand; and would not make an Order under it without consent. See *Smith v. Snow*, 3 Madd. 10; *Palmer v. The Earl of Carlise*, 1 Sim. & Stu. 423.

(2) *Pearce v. Piper*, post, vol. xvii. 1.

(3) *Ante*, vol. vii. 617.

(4) *Ante*, *Good v. Blewitt*, *Brown v. Harris*, vol. xiii. 397, 552; xix. 336, and the note, iv. 628.

tled, Lord Thurlow made the Decree without having all before the Court; and in the case before me the doubt was, whether there was not a vice and inaccuracy in the principle of the Institution, making it impossible to carry it into execution either in or out of Court; in other words, whether it was not a bubble; and I directed an inquiry as to that.

*Nov. 14th.* The Lord CHANCELLOR [ELDON].—The question is, whether a plea, that several persons are not parties, is a good bar to a Bill for discovery and relief. Where on the face of the Bill it appears, that there are not sufficient parties, that is a ground of demurrer: where the defect of parties does not appear on the Bill, that may be the subject of a plea; and the question, whether it is sufficient, must depend upon the Bill and the Plea, taken together. The strict rule is, that all persons, materially interested in the subject of the suit, however numerous, ought to be parties: that there may be a complete Decree between all parties, having material interests: \*but that, being a general rule, established for the [\*326] convenient administration of justice, must not be adhered to in cases, to which consistently with practical convenience it is incapable of application. Accordingly there are several well known cases of exception; and, without going through them all, I will mention one instance of not applying it to persons, having valuable interests in real estate: viz. where it has been held sufficient to bring before the Court the first person, having an estate of inheritance (1); though it cannot be denied, that, persons, having present, immediate, valuable, interests in the same real estate, may become most deeply affected by what is done here in their absence. The same principle in a great variety of cases has obliged the Court to dispense with the general rule as to persons, out of its jurisdiction; and there are many instances of justice administered in this Court in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered; as it obviously cannot be so completely, as if all persons interested were parties: but the Court does what it can (2).

There are various other cases; admitting the general principle; but forming exceptions upon circumstances. The Plaintiff, suing upon a joint and several bond, must bring forward all the obligors, principals, and sureties (3): but the rule is dispensed with, where it appears, that the sureties are insolvent; or have not paid any thing; and the demand is accordingly restrained, as a demand against the principal; who has nothing to demand over. The case of *The Water-works Company and Chancey v. May* (4) prove, that where it is impracticable to make parties, and yet the Court can by arrangement \*afterwards introduce the persons, as [\*327]

(1) See *ante*, vol. ix. 55, *Lloyd v. Jones*; *Reynoldson v. Perkins*, Amb. 564.

(2) See Beames El. Pl. Eq. 87, 8.

(3) *Bland v. Winter*, 1 Sim. & Stu. 246.

(4) Pre. Ch. 592, edition by Mr. Finch.

*Quasi* parties, the Court does not require, that they shall be parties on the record ; but will give the opportunity of introducing them by a subsequent proceeding ; and as to the objection, that the shares, originally few, may by assignment become very numerous, to which I alluded in the case of *Adair v. The New River Company* (1), the multiplication of parties cannot satisfactorily account for what the Court has done. As in the original institution of such concerns the interest, which the original undertakers have, is in its nature assignable, every party must be taken to assent to the others assigning, if they thought proper ; and the consequence is, that the multiplication of shares is with the general consent. The principle is, that practical convenience requires that sort of arrangement with regard to the persons, required as parties originally.

In the familiar case of creditors, suing on behalf of themselves and all others, what an infinite number of valuable interests may be bound, in a sense, not absolutely ; as, where the Court for convenience dispenses with the presence of parties, the principle leads it by future arrangement to find out the means of giving them an opportunity in some shape of coming in. Upon questions of marshalling, whether real estate is charged with debts, &c. the case may be sustained originally perhaps by persons, having interests of the least value : but certainly any person, afterwards becoming interested, would have his interest as much attended to, as if he had been originally a party. The Court must always be open to questions upon the carriage of the cause, applications for re-hearing, &c. ; and I should upon principle find the means, if not supplied by precedent (2), of giving a creditor, coming in after the institution of a suit, the opportunity of supporting his \* interest better than the Plaintiff could. A bond creditor, having been in partnership with the debtor, may, if there are assets, go in before the Master ; but the Court must find the means of ascertaining, whether such creditor was not a debtor on the partnership account ; and the account must be taken : or perhaps the Court may find itself obliged to direct a Bill to be filed ; reserving a proportion of the assets for the result of the inquiry in an actual suit. Lord Thurlow determined, that the general principle requires a residuary legatee to bring before the Court all persons, interested in the residue : but that admits of exception ; where it is not necessary, or convenient, that all should be before the Court ; as in *Chancey v. May* (3) and the case of *The Water-works Company*. If a residue had been left equally among all the individual members of those societies, upon the same ground of impracticability and inconvenience, it would be competent to some of them to file a Bill on behalf of themselves and the others ; though suing as residuary legatees.

There are various other cases : a Bill by the lord of a manor against some of the tenants, or, *vice versâ*, by tenants on behalf of themselves and the others, to establish some right : as a Bill with

(1) *Ante*, vol. xi. 429.

(2) See 1 Sch. & Lef. 409, *Giffard v. Hort*.

(3) Pre. Ch. 592, edition by Mr. Finch.

regard to suit to a mill (1): a Bill against parishioners for tithes; or by some parishioners to establish a *Modus*. Another class of cases is that of persons, who, though not a corporation, have the appearance of it: Assurance Societies; each being an insurer of the others; as, though it is settled by the Act of Parliament (2), that no persons, beyond a certain number, shall insure as a company, any number of persons may associate for the insurance of each other; all in effect participating as a partnership. It is evident, that

\* if occasion here should arise to resort here for an account, [\*329] as it would be impossible to bring all persons interested, the suit must be against some, being Proprietors, and accountable parties, instituted by some on behalf of all. This course was taken in the case of *The Widows' Charity* (3) by Lord Thurlow; upon which I observed in the late case of *The Bakers' Company, Pearce v. Piper*. The former arose upon an association of widows, contributing to a fund to pay them annuities. When this fund proved insufficient, every subscriber, who had not been a member long enough, to become an annuitant, and the representatives of those, who were dead, had an interest to state their title; in order to recover her money: but that difficulty was overcome upon this principle, that it was better to go as far as possible towards justice than to deny it altogether. So as to partnerships: the Court will settle the account between those parties who are before it: and do all possible justice. The principle being founded in convenience, a departure from it has been said to be justifiable, where necessary; and in all these cases the Court has not hesitated to depart from it, with the view by original and subsequent arrangement to do all, that can be done for the purposes of justice; rather than hold, that no justice shall subsist among persons, who may have entered into these contracts.

It is then said, something may be due to this Defendant. This is a plea to the whole discovery and relief; and it does not state enough to vary the effect of the allegations in the Bill: but if the Bill had stated, that on taking the account there would be a balance due to the Defendant, this plea would not bar the discovery and relief on the ground, that the Plaintiffs had not tendered to him that balance. What can be made of that is for future consideration: at all events it will not give validity to this plea. Though \* the Plaintiffs cannot bring forward all the persons, who [\*330] may be liable upon the result of the account, that is not an obstacle that should prevent the institution of this suit, if necessary to justice.

The Plea was over-ruled.

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In note 1 to *The Attorney General v. Jackson*, 11 V. 365; in note 2 to *Duff v. The East India Company*, 15 V. 198; and in note 3 to *The East India Company*

(1) *Ante*, vol. xi. 444.

(2) Stat. 6 Geo. I. c. 18, s. 12.

(3) *Post*, vol. xvii. 1.



v. *Neave*, 5 V. 173, are noticed some of the cases in which the general rule, requiring all parties interested in a suit to be before the court, may be dispensed with. As to the necessary parties to suits of foreclosure or redemption, see the note to *Montgomerie v. The Marquis of Bath*, 3 V. 560, and note 1 to *Bradshaw v. Outram*, 3 V. 234. That the cases in which it has been held sufficient to bring before the court the first person having an estate of inheritance in the property affected by the suit, is a rule rather of convenience than of strict equity, see note 1 to *Fletcher v. Tollet*, 5 V. 3; see, also, on this subject, note 3 to *Lord Peterborough v. The Duchess of Norfolk*, 2 Freem. 264 (2d edit.). In the early case of *Collins v. Griffith*, 2 P. Wins. 313, it was said, that a creditor by a joint and several bond may sue severally, if he pleases; but, in the still earlier *Anonymous case*, in 2 Freem. 127, c. 150, it was laid down distinctly, that a bill for payment of money upon a bond must be against all the obligors, or else the plaintiff can have no decree; for, in this matter, *æquitas non sequitur legem*. As to the practice at common law, see *Sayer v. Sayer*, 1 Lutw. 697. It is clear, both from the principal case, and *Bland v. Winter*, 1 Sim. & Stu. 248, that the rule laid down in Freeman's Reports, and not that cited from Peere Williams, is in conformity with the present practice: the reason for requiring all obligors to be made parties, is, because each obligor is entitled to the assistance of all the others in taking the account: *Madox v. Jackson*, 3 Atk. 406, and, by making the whole number parties, the circuity of another suit for contribution amongst the sureties is avoided: *Blois v. Blois*, 2 Vent. 348, n. It is true, as intimated in the principal case, when the bill states, and the defendant admits, a co-obligor to be insolvent, the last-mentioned reason ceases: *Angerstein v. Clarke*, 2 Dick. 738; but, though the obligee may not be bound to make an insolvent co-obligor a party, he is, at any rate, not precluded from doing so, if he thinks fit: *Haywood v. Ovey*, 6 Mad. 113. And in one case it was held, that, although a person who had entered into a recognisance only as a co-surety, was dead, insolvent, his executor ought to be made a party to a bill brought for contribution by one of the co-sureties who had paid the money: *Hole v. Harrison*, Rep. temp. Finch, 15. As a general rule, a bill filed by a residuary legatee or devisee must bring before the court all the legatees or devisees: *Sherrell v. Birch*, 3 Brown, 229; *Parsons v. Neville*, 3 Brown, 365; and, though the bequest be not residuary, yet, if it be charged on real estate, no legatee can file a bill without making every person claiming an interest out of the real estate so charged a party: *Morse v. Sadler*, 1 Cox, 352.

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### MACKINTOSH v. TOWNSEND.

[1809, JUNE 9, 12.]

LEGACY, to be laid out in land in Scotland for a Charity, established; being with-  
in the exception of the Stat. 9 Geo. II. c. 36.

WILLIAM MACKINTOSH by his Will, dated the 5th of April, 1797, among other things, directed, that the interest of 5000*l.* should be invested in trust with the Magistrates of Inverness for the time being: the interest of such sum to be appropriated for the education of five boys in succession to be selected from the descendants of different families named: the said sum of 5000*l.* as soon as may be expedient to be invested in lands in the country.

By a Codicil, dated April, 1798, at sea, the testator gave some directions in the selection of boys for education as to the preference of the families.

By another Codicil, dated in London, June the 10th, 1800, he

gave 5000*l.* "in trust with the Magistrates of Inverness added to the 5000*l.* in the first part of this Will intended there for the education of certain boys: the interest of which two sums, making in all 10,000*l.*" he directed to be paid to Mrs. Rae during her natural life; \* "and after her decease that sum is to be [\*331] vested in lands for the education of boys as above." He then directed, that the interest of whatever sums of money may appear above the legacies should be appropriated for the education of boys during the life of Mrs. Rae; directing the 10,000*l.* after her death to be finally and for ever secured on lands for the education of the boys, as formerly directed.

By two other codicils he revoked the bequest in favor of Mrs. Rae; and directed, that the 10,000*l.* should immediately upon his own death be appropriated for the education of boys, as before described; and he appointed the Plaintiff his residuary legatee.

The Will and the two last codicils were represented by the Bill to have been made at sea: the testator being Captain of an India ship.

A Decree was pronounced at the Rolls; directing the usual accounts; and an inquiry, who were entitled to the legacy of 10,000*l.* After that Decree a question was raised, which was not made at the Rolls; whether the legacy was not void under the Act of Geo. II. (1); or whether it was within the exception (2); providing, that "nothing in this Act contained shall extend or be construed to extend to the disposition, grant or settlement, of any estate real or personal lying or being within that part of Great Britain called Scotland;" and that point was brought before the Lord Chancellor by way of appeal, on account of the rule against taking that course after a rehearing at the Rolls (3).

Sir *Samuel Romilly* and Mr. *Bell*, for the Appellants.—

\* This bequest of money, to be laid out in the purchase of [\*332] land in Scotland, to be appropriated to a perpetual charity, must be considered as within the meaning of the Act, unless it is comprehended within the exception. Since the Union with Scotland every Act of Parliament, not expressly declared to be local, extends through the whole of Great Britain. The exception in this Act, relating to Scotland, is, not the usual exception in local Acts, that it shall not relate to Scotland, a general provision as to the whole operation of the Act, but an exception very peculiar; stating particularly, in what respect the Act shall not have operation in that part of the kingdom. This is a disposition, not of real or personal estate in Scotland, in the terms of the exception, but of personal estate in England; to be applied in a manner expressly prohibited by the Act. Admitting, that it is extremely difficult to conceive the intention to allow such an application of personal property in Scotland, and not of personal property, derived from England, that it is a

(1) Stat. 9 Geo. II. c. 36.

(2) Sect. 6.

(3) *Ante, Brown v. Higgs*, vol. viii. 561; see the note, v. 725.

strange, capricious, intention to impute to the Legislature, the answer is, that they did not look to the circumstance. If there is no authority upon this question, a notion has probably prevailed, that the exception took Scotland generally out of the Act; the particular terms, confined to estate, locally situated in that country, not being adverted to.

All the Mortmain Acts are considered as remedial; directed against an inconvenience, that was very sensibly felt; and are therefore to be liberally construed. The conclusion, collected upon that principle, must be, that, if the Act was not to extend to Scotland, generally, the common, general, clause would have been adopted.

The special terms of this clause furnish decisive evidence, [\* 333] that a general exception was not proposed; \* and there is no more dangerous mode of construction than upon conjecture departing from a sensible and rational interpretation of words.

Mr. *Alexander* and Mr. *Newland*, for the Respondents.—This objection, if it prevails, will be fatal to many Charities, now subsisting. The general opinion against it was confirmed by Lord Thurlow's decision in the case of *Oliphant v. Hendrie* (1). The sole object of the Act was to prevent lands from becoming unalienable. Money, and mere personal chattels, are entirely without the view of the Act. Such property is the subject of the enactment, only when given to be laid out in land. The prohibition is expressly confined to land, or money, given to be laid out in the purchase of land. How inconsistent with this view of the Legislature is the construction which the Appellants attempt to put upon the 6th clause of the Statute containing the exception respecting Scotland. They say, that the exception extends to estate real and personal lying in Scotland; making every thing depend upon its locality. Personal estate, being in Scotland, is entirely out of the Act, as they say; therefore it may be given to be laid out in English lands: that is, if the personal estate has a locality in Scotland, the whole object of the Act may be defeated; and any quantity of land in England may be rendered unalienable. The exception repeals the Act; and disappoints its object; and its application to a particular case is made to depend upon a circumstance, always considered as indifferent, the locality of personal property. Again, suppose personal property, locally in England, is bequeathed to be laid out in land in Scotland; and settled to charitable uses: according to the Appellant this bequest is expressly within the Act; as the personal property is lo- [\* 334] cally \* in England; and personal property is not excepted, unless it is locally in Scotland. That is, their proposition and the argument of the present moment: in other words, though land in Scotland may be given in mortmain, yet you cannot buy it for that purpose with English money. Scottish land and English money are both of them, when separate, clearly out of the Act, but when you unite them by directing the English money to be laid out

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(1) 1 Bro. C. C. 571.

in Scottish land, then, according to the Appellant, the case is clearly within the Act. No intention more inconsistent or absurd can ever be imputed to the Legislature.

But how is this difficulty to be avoided? By construing the words in question in the clause, excepting Scotland, viz: the words "estate personal" to relate only to such personal estate as is the subject of the Act, viz. personal estate given to be laid out in land. The exception in the 6th clause from the prohibition in the 1st, is too shortly expressed: but, in order to discover, to what the last clause relates, look at the prohibition in the first. Make the prohibition, and the exception from the prohibition, speak the same language, and relate to the same subject. Then in the prohibitory clause you will find, that there is no general prohibition against giving personal estate. What is prohibited is the gift of personal estate, to be laid out in land. Understand the language of the exception, applied to that prohibition, to be limited in the same manner. Decide, that nothing is excepted from the prohibition but what is before prohibited. If this be done, the personal estate, spoken of in the 6th clause, is personal estate, given to be laid out in land; and the clause will run thus: "Any estate real or personal to be laid out in land lying or being within that part of Great Britain called Scotland." In this way the object of the Act is answered; and the whole is consistent. A much stronger construction than is required to support this disposition has been made, not upon Wills only, \*but upon Deeds and Acts of Parliament: for in- [\* 335] stance, leases by Ecclesiastical Corporations, declared void to all intents and purposes, have been held good against the persons, making them.

Sir *Samuel Romilly* in reply.—In construing Acts of Parliament there are two directions, to be attended to: the first, which is the safest, to find out the general object of the Legislature: secondly, to see, what sort of construction has been put upon the Act in other cases. One object of this Statute was certainly to prevent land being put out of circulation: but that was not the only object; as it may be done by deed; and personal property may be given to be invested in land for a Charity under the regulations, there stated; and land directed to be sold, and the money to be applied to a Charity, is a case within the Act; though in that way land is not put in mortmain. The principal object of the Legislature seems to have been to prevent improvident dispositions upon the approach of death; when a person, having his end in contemplation, would probably take an erroneous view with regard to a pious and charitable disposition: to protect such persons, and those, who would represent them, from the inclination to make such a disposition at a time, when, with regard to their families and natural claims upon them, an act, the most improvident and improper, might appear to them to be the wisest.

Upon these grounds this Statute has been considered as highly remedial; which therefore should receive the most extensive, and the clause of exception the most strict, construction; and accord-

ingly in Courts of Equity the most extensive construction has been given to this Act. Cases, unquestionably not within the words, have been held within the spirit and meaning: a mortgage, for instance; which is considered only as a debt: so all property, of the nature of real estate; as tolls (1). Upon the same principle Courts of Equity have, to promote the object of this Statute, departed from the rules they apply in all other cases. They will not marshal assets for a Charity (2); upon no other reason, but that a law, so highly remedial, and providing against so great an evil as such dispositions in prospect of death, should have the most extensive operation; and the same spirit requires the most strict construction of the exception.

It is very singular that the Legislature, meaning no more than that this Act should have no operation whatsoever in Scotland, should have adopted this circuitous mode of expression, instead of the short and obvious terms, invariably used for such a purpose on other occasions. For the true construction of these words the third section must be looked at: the whole effect is, that land or money in Scotland may be given for a charity in the way, prohibited by the general provisions of the Act, with regard to land, or money to be laid out in land; and the construction cannot be, that personal estate in England, to be laid out in real estate in Scotland, was intended. Admitting the inconvenient consequence, that personal estate, in Scotland, to be laid out in land in England, would be within the exception, and not within the Act, the reason may be referred to the distinction, that the salutary law of death-bed, in Scotland (3), [\* 337] does not prevail \* here. The object being to counteract those false notions of piety, which are the inducements to these dispositions, the inclination of the Court has always been against them: and the strict letter of the Statute corresponds upon this occasion with that inclination. All personal estate has locality in contemplation of law; a consequence of which is, that administration is granted in the province of Canterbury, or of York, according to the locality of the property: upon which principle it has been held, that a bond would not pass by a bequest of all goods and chattels in a house, or in a particular county; having locality, where the debtor was (4).

The Lord CHANCELLOR [ELDON].—Before I decide this cause the Register's Book must be examined for the case of *Oliphant v. Hendrie*. This Act received considerable alteration in the Committee. I have looked into the proceedings; and the entry is, that the clause was then read, that "this Act shall not extend to Scotland; which was agreed to:" and M'Douall, in his Institutes, who gives a comparison of the English and Scotch laws, states the circumstance of this law

(1) *Ande, Knapp v. Williams, House v. Chapman*, vol. iv. 430, n. 542. So as to securities upon poor-rates and county-rates: *Finch v. Squire*, x. 41.

(2) *The Attorney General v. Tyndall, Foster v. Blagden, Hillyard v. Taylor*, Amb. 614, 704, 713.

(3) 2 Ersk. Inst. 594.

(4) *Moore v. Moore*, 1 Bro. C. C. 127; *Jones v. Lord Seston*, ante, vol. iv. 161.

having passed; and deplores, that it was not extended to Scotland. I do not lay much stress upon that. Another question will be, whether the purpose of this bequest is one, with regard to which land can be *mortified*, as it is said, in Scotland; where land cannot be given to all sorts of charity.

*June 12th.* The Lord CHANCELLOR [ELDON].—Upon examining the case of *Oliphant v. Hendrie* (1) in the Register's Book there appears to be nothing special in it. The testator gave a sum of money to be laid \*out in heritable securities in [\*338] Scotland for charitable purposes; and Lord Thurlow's Decree was, that the legacy was good. This is a direct decision upon the point; and, if I had more doubt upon it, that authority binds me to determine, that this is a good bequest (2).

SEE, *ante*, the notes to *Grieves v. Case*, 1 V. 548, as to the cases of charitable bequests or devises, which are, or are not, within the Statute of Mortmain: and as to the rule (acted on in the principal case) against allowing a rehearing to be reheard; and, also, as to the exceptions, at any rate, which that rule admits: see note 5 to *Waldo v. Caley*, 16 V. 206.

## THE ATTORNEY GENERAL v. NICHOL.

[1809, Nov. 6, 7, 9.]

SERVICE of Subpœna necessary in the case of special Injunction; but the practice having been unsettled, the Defendant was put to dissolve upon the merits; and the Plaintiff permitted to show cause by Affidavit (a).

Injunction against darkening ancient windows not in every case, affecting the value of premises, that would support an Action. The effect must be that material injury, amounting to nuisance, which should, not only be redressed by damages, but upon equitable principles prevented.

The object of this information, filed at the relation of the Scottish

(1) 1 Bro. C. C. 571.

(2) *Ante*, *Curtis v. Hutton*, vol. xiv. 537; and the note, 540.

(a) 2 Madd. Ch. Pr. 219, 220.

Where a party builds so near a house of another as to darken his windows, against the clear rights of the latter, either by contract, or ancient possession, Courts of Equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already done, although an action for damages would lie at law; for the latter cannot be deemed an adequate relief in such a case. The injury is material, and operates daily to destroy or diminish the comfort and use of the neighboring house, and the remedy by a multiplicity of actions for the continuance of it, would furnish no substantial compensation. 2 Story, Eq. Jur. § 926, 927; *Eden*, *Injunc. ch. 11*, 231, 232; *Corning v. Lavere*, 6 Johns. 439; *Back v. Slacey*, 2 Russ. 121; 1 Madd. Ch. Pr. 155; *Jeremy*, Eq. Jur. 310, 311.

Where a block of buildings has been erected, with particular covenants respecting the enjoyment thereof, each purchaser or owner will be entitled to an injunction to prevent the breach of the covenants, as by the erection of livery stables, slaughter-houses, glue-factories; *Barrow v. Richards*, 8 Paige, 351; *Williams v. Jersey*, 1 Craig & Phillips, 91.

Hospital, was to restrain the Defendant from building up a certain wall, erection, or building, above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital.

An Injunction was obtained on the 15th of July, without notice, upon affidavit and certificate of the information filed. The Hospital is situated in Crane Court, Fleet Street; where the Defendant occupies some adjoining premises, for the purpose of carrying on his business, as a printer: the wall, which was the subject of complaint, being, not opposite, but at right angles with the Hospital. The affidavits represented, that the relators gave notice to the Defendant not to raise the wall higher than sixteen feet; that notwithstanding that notice he proceeded and had carried it up to twenty feet; that the ancient windows of the Hospital are by this wall darkened and obscured; and if it should be carried higher, they will be to [\* 339] a greater degree darkened and obscured; and so \* much as materially to affect the value of the premises. The relators had brought an action.

The writ of Injunction was dated the 22d of July, and was served on the Defendant on the 1st of September following, but the Defendant was never served with any writ of subpœna to appear and answer the information.

Sir *Samuel Romilly*, at the second Seal before the Term, moved, upon notice, that the Information might be dismissed, and the Injunction dissolved, on the ground, that no subpœna had been served.

Sir *Arthur Pigott*, Mr. *Alexander*, and Mr. *Clason*, showed cause against dissolving the Injunction; contending, that in these cases of special injunction it is not necessary to serve the writ of subpœna; as the Defendant, having notice of the information by service of the injunction, might appear gratis; and put in his answer; the form of the Injunction being, "until the Defendant appear, and full answer make;" and accordingly, the practice in these cases is not to serve a subpœna.

Sir *Samuel Romilly* and Mr. *Joseph Martin*, for the Defendant, contended, that the subpœna ought to be served in all cases; and the Injunction ought to be dissolved for want of it in this case: *Patrick v. Harrison* (1).

The Lord CHANCELLOR appeared to think, that the subpœna ought to have been served; but refused to dissolve the Injunction; as in this case the party was misled as to the practice, and in fact the practice seemed to have been both ways.

[\* 340] Sir *Samuel Romilly* \* then proposed to go into the merits; for the purpose of dissolving the Injunction: the Defendant having, when the motion was originally made, produced an affidavit upon the merits, as to his right to erect the building or alleged obstruction in question.

The Counsel for the Information objected to the Defendant being heard on the merits on affidavit; or until he put in his answer.

The Lord CHANCELLOR (1) held, that the Defendant in this case was entitled to be heard on affidavit; as the relators, not having served the subpœna, should be considered as having waived their right to an answer; and that in these cases, where no subpœna was served, it was competent to the Defendant to come to the Court to dissolve the Injunction upon the merits, disclosed by affidavit (1).

*Nov. 9th.* The Motion for dissolving the Injunction accordingly proceeded upon the merits.

Sir *Samuel Romilly* and Mr. *Joseph Martin*, for the Defendant, in support of the Motion.—The jurisdiction by injunction against stopping up ancient lights, notwithstanding the common law remedy by action or otherwise, is not disputed: but for that purpose the effect of the erection must be a total deprivation of light: not merely an obstruction; so that the Plaintiff has not so much light as he previously enjoyed. The ground for the interference of this Court by Injunction is irreparable injury to every useful purpose: not merely \*the inconvenience, that may be sustained by [\* 341] intercepting the light in a certain degree. This, if once admitted, may be pushed to a great extent. The addition of one story to a house in a narrow street must in some degree darken the opposite houses. In *The Fishmongers' Company v. The East India Company* (2) Lord Hardwicke's reasoning does not apply to the distinctions between an injunction and ordering the wall to be taken down; and the application was refused as to both objects.

The circumstances of this case are peculiar. There is an area of eighteen feet in front; and this building is, not directly in front, before the windows of the Hospital, but on one side, at right angles, with an interval of seven feet; diminishing certainly, but not excluding the light. The single question is, whether this is a nuisance; and if there is any doubt, the Court will not interpose in this summary way.

Sir *Arthur Pigott*, Mr. *Alexander*, and Mr. *Clason*, for the Relators, argued, that the right to an injunction cannot depend upon the position, or the distance, of this building; nor is it necessary, that the light should be wholly intercepted; if, as the affidavits state, the effect is, that these ancient lights are darkened and obscured; and, if the building shall be carried higher, will be in a greater degree darkened and obscured; so much as materially to affect the value of the premises.

The Lord CHANCELLOR [ELDON].—With regard to the jurisdiction of this Court many of the circumstances, that have been pressed in the argument, lay no foundation for it. Cases may exist, upon which this Court could not interfere: yet an action upon the \*case might be very well maintained. The wall [\* 342] between a man and his neighbor may belong to the one,

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(1) The judgment of these two points *Ex relatione*.

(2) 1 Dick. 163.



both in respect of property and the obligation to repair: and yet the other might support an action on the case for making a window in it, or for raising the wall: but the consequence does not follow, that a Court of Equity has any jurisdiction. The foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke (1), that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages more or less, would be given in an action at Law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. Assuming therefore, that from circumstances of enjoyment, usage, or interest, some contract could be implied, that this Defendant should not build upon the premises he occupies, to the east of the Hospital, and that an action on the case could be maintained upon that ground, that would not induce this Court to interpose by Injunction; unless the consequences of the act, which may be represented as illegal, being a violation of contract, express or implied, appeared to be such as should be, not merely redressed, but prevented by application of the peculiar means of this Court.

I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground; and there is as little doubt, that this Court will not interpose upon every degree [\*343] of \*darkening ancient lights and windows. There are many obvious cases of new buildings, darkening those opposite to them, but not in such a degree that an Injunction could be maintained: or an action upon the case; which however might be maintained in many cases, which would not support an Injunction. These affidavits therefore, stating only, that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do. Farther, the affidavits and the information regard only the case of a perpendicular building, with a wall twenty feet high: which might have an effect so injurious, that it would be restrained; though a lower elevation, with a sloping roof, would let in so much light, that the interposition of this Court would not be justified: and upon the proposal, now made, limiting the wall to sixteen feet, I have no rule for determining to what elevation under twenty feet it may be carried without any injurious effect. Considering also the particular circumstances, in which the Defendant is represented as standing with reference to his business, and that they have got so near a decision (2), which I, should be very unwilling by my interference to retard, I will dissolve this In-

(1) 1 Dick. 164; *post*, *Attorney General v. Cleaver*, vol. xviii. 211; *Crowder v. Tinkler*, xix. 617.

(2) An action on the case by the Hospital was depending.

junction: the Defendant undertaking, if upon the trial, promptly had, the verdict shall be against him, to remove such building as shall be proved in a material and improper degree affecting these ancient lights.

The Defendant gave the undertaking accordingly (1).

BEFORE instituting the proceedings in the principal case by information and bill, the relators had commenced an action at law; but that fact, the court was of opinion, made no difference as to their right to an injunction, nor were they ordered to discontinue their action, though they offered to do so, if that was thought necessary to entitle them to the injunction: see 3 Meriv. 687. Indeed, there would be little consistency in holding, that the pendency of an action to determine the legal right, should be an objection to granting an injunction to restrain waste which could not be compensated by verdict for damages; when one of the ordinary terms upon which an injunction issues is, that the party asking it shall proceed to trial of his right in an action: *Attorney General v. Bentham*, 1 Dick. 277; *S. C.* 1 Ves. Sen. 544. And, if the legal question appear open to any considerable doubt a court of equity will not interpose before a trial at law has actually taken place, unless the nature of the alleged injury imperiously requires preventive interposition: *Wynstanley v. Lee*, 2 Swanst. 336; *Crowder v. Tinckler*, 19 Ves. 622; and see note 3 to *Hillary v. Walker*, 12 V. 239. The propriety of granting an injunction may depend upon a question of fact, which fact the court, though it may have an admitted jurisdiction to entertain the suit, would be bound to try by the intervention of a jury; and then the consideration would be, whether an injunction should issue in the interval, or whether it is competent to the court of equity so to arrange the trial at law, that the equitable relief should not be too long delayed: *Attorney General v. Cleaver*, 18 Ves. 218. But, where the plaintiff has previously established his right at law, there is no doubt he will be entitled to an injunction before answer, upon showing, by affidavit, the probability of his sustaining irreparable mischief, unless summary protection is afforded him: *Chalk v. Wyatt*, 3 Meriv. 688.

### KEIGHLEY v. BROWN.

[\* 344]

[1809, Nov. 16, 17.]

REFERENCE, whether several Tithe Causes should be consolidated, not of course before Answer.

SEVERAL Bills were filed by a rector, praying an account of tithes; making seven or eight occupiers Defendants in each suit; and stating notices at Lammas, in the year 1803, to determine a composition, which had been paid down to that time.

A Motion was made on the part of several of the Defendants for a reference to the Master to examine and certify, whether the several causes, or some, and which of them, may not be consolidated; and in the mean time that all farther proceedings may be stayed. The Motion was made before answer, and without affidavits.

Sir Samuel Romilly, in support of the Motion, contended, that

(1) *Attorney General v. Nichol*, *Chalk v. Wyatt*, 3 Mer. 687, 8; *Wynstanley v. Lee*, 2 Swanst. 333.

this Order should be made of course. Here are between forty and fifty Defendants ; and six suits ; each against seven or eight persons ; and the same question is put in issue in all the causes ; the Defendants insist upon a *Modus* : the Plaintiff denies the *Modus* ; but admits, that a composition has been paid ; which he has determined. In *Pyke v. Brock* (1), this Motion was made before answer.

Mr. *Hart*, for the Plaintiff, insisted, that this could not be considered a motion of course : there may be various defences ; and there is no justice in compelling the plaintiff to conduct his cause according to the discretion of the Defendants. The reason for proceeding by different suits is the danger of abatement. The parties might agree to be bound by the decision in one suit. At [\* 345] \* least it should appear upon the Record, that these suits have one and the same object.

Sir *Samuel Romilly*, in reply.—That would not be just ; unless a decision upon the merits can be insured. There is great nicety in pleading a *Modus* ; and the consequence frequently is a decision in favor of the Rector against the merits. Such terms are never imposed in the Court of Exchequer ; where nothing is required but an affidavit, that there is no subscription.

The Lord CHANCELLOR [ELDON].—I will consult some of the Barons of the Exchequer upon this point ; not seeing my way very clearly to determine, what ought to be the practice here. I had taken the course of the Court of Exchequer to be this ; that if there were several Defendants, of whom some set up different *Modusses*, and others set up *Compositions*, some well, some ill, determined, and there may therefore be several distinct cases in one suit, yet that Court did very freely consolidate cases of this description. It appears to me rather the subject of a special application than of course.

The Court of King's Bench by their power of granting *imparlances* compel parties to consolidate insurance causes : a strong measure originally ; obliging one man in that way to be bound by a judgment against another.

*Nov. 17th.*—The LORD CHANCELLOR said, he had mentioned this point to Baron Thompson ; who had no idea, that this Order is of course in the Court of Exchequer ; though sometimes made under special circumstances.

The Order was not made.

THERE are cases, no doubt, in which the Court of Exchequer has ordered several causes, brought for the same matters, involving the like questions, and seeking the same relief, to be consolidated : *Scott v. Allgood*, cited in 1 Fowl. Ex. Pr. 81 ; *Mason v. Croft*, and *Pyke v. Brook*, *ibid*, p. 214. But this court, both when sitting as a court of law, and when sitting as a court of equity, has, in later cases, disapproved that practice : *Le Jeune v. Sheridan*, Forrester's Exch. Rep. 31 ; *Forman v. Blake*, 7 Price, 654 ; *Foreman v. Southwood*, 8 Price, 575.

## BORAINE'S CASE.

[1809, DEC. 7, 11.]

WRIT to absolve a person, unlawfully excommunicated. Notice required.

A MOTION was made, that a writ may issue, directed to the Bishop, calling upon him to absolve a person, excommunicated under these circumstances. Thomas Boraïne, an infant, was summoned to appear in the Consistory Court to a suit by his wife for separation. He appeared to the citation; and was informed, that there must be a guardian *ad Litem*. His father being called upon to accept that office, refused; but was appointed against his Will; and, as he persisted in declining to act, at length sentence of excommunication was passed against him.

Sir Samuel Romilly and Mr. Wingfield in support of the Motion.— This Motion, which is certainly new, is made without notice; as the party applying could not know, who should be served. The application is made upon the ground, that it is not competent to the Ecclesiastical Court to compel a party to take upon him the office of guardian *ad Litem*. An application might have been made to this Court for the writ *de excommunicato Capiendo*; which would have brought forward all the circumstances: but this person is compelled to state his case in this manner; and, unless there is a remedy here, there can be no redress; and the effect will be great injustice; as it is impossible to represent, that a person, excommunicated for not appearing to a suit, to which he is not a party, is excommunicated according to Law. In *Fitzherbert* (1) it is stated, that before the writ *de excommunicato Capiendo* shall be granted, the contumacy and contempt by the \* party ought to be certified into the Chancery by the [\* 347] Bishop by letters under his seal; and if the excommunicate hath made satisfaction unto the Church for his contumacy and contempt, &c. then the Bishop, &c. ought to certify to the King in Chancery, that the party hath made satisfaction; and thereupon he shall have the writ, commanding the sheriff to cause him to be delivered out of prison.

The authority of Lord Coke is decisive in favor of such a writ; stating (2), that when a man is justly excommunicated, and taken by force of the King's writ *de excommunicato Capiendo*, if the Bishop upon the King's writ *de Cautione admittenda*, &c. do not deliver him, then shall a writ out of the Chancery go to the Sheriff upon the refusal of the Bishop to deliver him: or, if the party be excommunicated for a matter, which belongs not to ecclesiastical cognisance, and taken by force of the King's writ, then the party grieved shall have a writ out of the Chancery to the sheriff to deliver him out of prison. In another place (3) it is stated, that in all cases, where a

(1) Fitz. Nat. Brev. Writ *de excommunicato Capiendo*, 62, 63; 7th ed. 144, 145.

(2) 2 Inst. 623.

(3) 12 Co. 67, tit. Prohibition.

man is excommunicated by the Bishop against our Law, he shall have a writ out of the Chancery, directed to the Bishop, commanding him to assoil him; and with this agrees 7 Edw. IV. 14.

The Lord CHANCELLOR said, he should look into the old writs upon this point; and suggested, that notice should be given to the Bishop as upon a motion for a prohibition.

*Dec. 11th.* The Lord CHANCELLOR [ELDON].—The result of my researches upon this subject, which I have looked into [\* 348] very attentively, is, that, where the \*Spiritual Court has excommunicated a person for a cause, for which they have not, by the Law of the land, authority to do so, he has a right to some such writ: but excommunication being in the nature of process to assist a demand against the party excommunicated, it is necessary to give the complainant in the Spiritual Court notice of the Motion. Let that notice therefore be given. At present I cannot see the principle, upon which, with regard to a son *foris-familiated* the father can be compelled to be guardian *ad Litem*.

THE proceedings of the ecclesiastical courts by excommunication have been discontinued by the statute of 53 Geo. III. c. 127, except as to cases of excommunication in definitive sentences, pronounced as *spiritual* censures for offences of ecclesiastical cognizance; and, even in such cases, the person so pronounced excommunicate, is to incur no *civil* penalty or incapacity whatsoever, in consequence of such excommunication, save imprisonment, not exceeding six months.

## YOUNG v. KEIGHLY (1).

[1809, Nov. 16, 21; Dec. 11.]

BILL of Review, or a supplemental Bill in nature of it, where the Decree has not been enrolled, upon new evidence, discovered since publication, not permitted, to introduce a new case, of which the party was sufficiently apprised to enable him with reasonable diligence to have put it upon the Record originally (a).

Grounds of Bill of Review: Error apparent: new evidence, discovered since publication, as to a material fact, [p. 350.]

A PETITION was presented by the Plaintiff for leave to file a Bill of Review in this cause upon the ground of evidence since discovered: the affidavit stating, that neither the Plaintiff, nor, as he be-

(1) Reported *ante*, vol. xv. 557.

(a) A Bill of Review may be brought upon the discovery of new matter, to prove what was before in issue, and not to prove a title not before in issue; not to make a new case, but to establish the old one. Story, Eq. Pl. § 413-417; *Dexter v. Arnold*, 5 Mason, 312.

Mr. Chancellor Kent seems to think that the new matter or evidence must not be a mere accumulation of witnesses to the same fact; but some stringent written evidence, or newly discovered paper; *Livingston v. Hubbs*, 3 Johns. Ch. 124.

The new matter must have first come to the knowledge of the party, after the time, when it could have been used in the cause at the original hearing. Story,

lieves, his Solicitor, now deceased, knew, that the securities, proposed by the Defendant Keighly in his letter, dated the 17th of April, 1800, were the joint property of Keighly, Ferguson and Armstrong.

Sir *Arthur Piggott* Mr. *Leach*, and Mr. *Wingfield*, in support of the Petition, contended, that the rule upon this subject is not so strict, that the new evidence, which is the foundation of the application for leave to file a Bill of Review, must have come to the knowledge of the party, after the cause was heard; and it is sufficient, if

\* that knowledge was acquired after publication: *Norris* [\* 349] v. *Le Neve* (1), and *Patterson v. Slaughter* (2).

Sir *Samuel Romilly* and Mr. *Bell*, for the Defendants.—This application, if complied with, will form a precedent of great importance; and must produce the most injurious consequences. Certain rules as to Bills of Review have been always most strictly adhered to. In *Norris v. Le Neve* Lord Hardwicke observes, that Lord Bacon's Rules had not been departed from: the notion, which had prevailed to the contrary, being founded in error; and those Rules have never since been departed from. The only cases, in which a Bill of Review can be filed, are, where there is error on the face of the Decree; and where evidence has come to the knowledge of the party, of which they had not, and could not have acquired, knowledge before the time, when publication passed; which therefore they could have used in the original cause; and that fact must always be ascertained by evidence. The object of this application is to enable the Plaintiff to begin again with a case, completely new. This evidence may be material: but that is no ground. The Plaintiff must before the examination have known, that these securities were the property of the three partners: that forming the very ground of the Decree, and the inquiry directed, what interest Keighly alone had.

*Nov. 21st.* The Lord CHANCELLOR (3) [ELDON].—There is a distinction in the application for leave to file a Bill, impeaching a Decree upon evidence, since discovered. If the Decree has been enrolled, a Bill of Review \*is necessary: if it has [\* 350] not been enrolled, the mode is by a supplemental Bill in the nature of a Bill of Review (4). The ground is error apparent on the face of the Decree (5); or new evidence of a fact, material-

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Eq. Pl. § 413; *Dexter v. Arnold*, 5 Mason, 312; *Ord v. Noel*, 6 Madd. 127; *Wiser v. Blackley*, 2 Johns. Ch. 488.

It must also be such as the party, by the use of reasonable diligence, could not have known; for, any laches or negligence in this respect will destroy the title to relief; ib. *Pendleton v. Hay*, 3 Paige, 204; *Wiser v. Blackley*, 2 Johns. Ch. 488; *Barrow v. Rhineland*, 3 Johns. ch. 120; *Bingham v. Dawson*, 1 Jac. & Walk. 243; *Barrington v. O'Brien*, 2 B. & Beatt. 140; *Blake v. Foster*, 2 B. & Beatt. 457, 461.

(1) 3 Atk. 26.

(2) Amb. 292.

(3) *Ex relatione*.

(4) Mitf. 81.

(5) A Bill of Review for error apparent may be filed without leave of the Court, 2 Atk. 534. Upon new matter, existing at the time of the Decree, but discovered

ly pressing upon the Decree; and discovered at least after publication in the cause. If the fact had been known before publication, though some contradiction appears in the cases, there is no authority, that new evidence would not be a sufficient ground.

The ground of this application, upon the Plaintiff's affidavit, is, that he and his Solicitor, now deceased, did not know, that Keighly's partners had an interest with him in the securities proposed; and would be bound by his acts. It is extremely difficult to come to that conclusion, where the information before them led to those facts; and the Solicitor's want of information would not form a just ground for granting a Bill of Review, if by what was before him he was sufficiently apprised of them to enable him to acquire complete knowledge. The letter, stating the securities to be *their* securities, that is, securities of the three partners, as they might be in equity, though the legal interest was in Keighly, at least put the Plaintiff upon inquiry. If he chooses to pray against one party only relief, which he might have had against all, that is no ground for a Bill of Review. Nothing is more clear, than that a strong affidavit is necessary for this purpose.

*Dec. 11th.* The Lord CHANCELLOR [ELDON].—This [\* 351] is an extremely important question. \*The evidence, the discovery of which is supposed to form a ground for this application, is very material: and I am persuaded, that by refusing the application I decide against the Plaintiff in a case, in which he might, perhaps with confidence, have contended, that upon the evidence he was entitled to the whole money. On the other hand, it is most incumbent on the Court to take care, that the same subject shall not be put in a course of repeated litigation; and that, with a view to the termination of suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. The Court must not therefore be induced by any persuasion as to the fact, that the Plaintiff had originally a demand, which he could clearly have sustained, to break down rules established to prevent general mischief at the expense, even of particular injury.

The original Bill was filed against Keighly alone; stating the circumstances, under which the Plaintiff was a creditor for 10,000*l.* upon certain securities. In the course of a correspondence between the Solicitors Keighly proposed payment by two instalments, of six and twelve months, without prejudice to the securities, then held by the Plaintiff; and by a letter, dated the 17th of April, 1800, to the Plaintiff's Solicitor, offered a bond, signed by himself, Ferguson and Armstrong, "being the present firm;" stating securities, which they had by bond and mortgage on estates in Jamaica, to the amount of 26,000*l.* The effect of that letter is the proposal of the joint and several security of three persons, forming a firm or partnership, and

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afterwards, a deposit of 50*l.* is required; and Lord Hardwicke held a Petition to rehear or an Appeal to be also necessary. *Moore v. Moore*, 2 Ves. 596.

possessed of those securities, to that amount. In fact Keighly had in him solely either the legal or equitable interest in those securities; unless as they \* might have been taken out of [\* 352] him by agreement with those persons, who are represented as constituting "the present firm." The letter, however, importing a contract with them, might be taken as a suggestion, that Keighly had not the sole interest in the securities, alluded to.

The Bill, stating a contract, *prima facie* importing, that the joint and several security of the three was to be procured, does not make the other persons parties; and pray that the bonds proposed may be executed; or that Keighly may procure the others to accede to the agreement, and that those securities which, according to his representation were their property, may be assigned; but prays simply, that the Defendant may be decreed specifically to perform his agreement, as to an assignment of those securities; without prejudice to the securities; already held by the Plaintiff.

The answer does not distinctly introduce the fact, that the Defendant's partners had at the date of that letter any interest in these securities; except as it might be collected from the letter; but discloses his difficulty of carrying the agreement into execution; created by the subsequent transaction, an assignment by the partnership for the benefit of their creditors; upon which a supplemental Bill was filed; representing that fact as an assignment of all the estate and effects of Ferguson, Armstrong, and Keighly; not however containing any charge, that the other persons, if they had any interest, would by their conduct have been bound to accede to the contract, according to the terms of that letter; not asserting, that, though the interest might not be in Keighly alone, they had permitted him so to deal, that they might be called upon to execute his contract; but simply praying the relief against the parties, introduced by the supplemental Bill. \* The suit there- [\* 353] fore was treated, and the Decree made, upon the principle, that Keighly's interest was to be affected by his contract; and there is upon this record no intimation, that, if these securities were joint estate, by the conduct of the other partners their joint interests were to be bound by the obligation and contract, which the letter of Keighly imports.

Upon a supplemental Bill in the nature of a Bill of Review, the question always is, not what the Plaintiff knew, but what, using reasonable diligence, he might have known. The Plaintiff might have instituted his suit upon the footing of contract; making these persons, if he considered their interests as bound parties; or praying, that Keighly might procure them to join. It does not however rest there. The Supplemental Bill brings forward parties, having an interest to contend against the Plaintiff; but does not put in issue any circumstance, opening to proof, that by reason of their conduct the contract, considered as the contract of Keighly alone, would have bound their interests. The affidavit, which has been made, that the Plaintiff, and as the deponent believes, his Solicitor, now deceased,



did not know, until a certain period, that these were joint securities, creates great difficulty to apply, in this instance, with safety to the general interests of mankind, the doctrine as to Bills of Review. This affidavit is not applied to a record, representing, that, though the Plaintiff, when he filed the Bills, knew, that these securities were not the sole property of Keighly, they ought, as the effect of the conduct of the other partners, to be so considered: the facts being capable of proof by evidence, which the Plaintiff could not before have discovered; and therefore he is entitled to file a Bill of Review. The question however is, whether the Plaintiff, who did not by amendment introduce any ground for compelling an assignment of

what was not Keighly's, may now, admitting, that he did [\* 354] \* not tender any newly discovered evidence in support of the case on the Record, upon the ground of newly-discovered evidence desire, that a case entirely new may be introduced; and with this difficulty in the case, that both the original and Supplemental Bills contained information, upon which the Plaintiff was required with reasonable diligence, to try that case at first.

As far as I can ascertain what the Court permits with regard to Bills of Review upon facts, newly discovered, the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case: and are not applicable, where the original cause does not admit the introduction of the evidence: as not being put in issue originally: especially where enough appeared upon the original and Supplemental Bills to call upon the Plaintiff, using reasonable diligence, to bring forward the whole case. I admit, a party should not be taken strictly to know every thing, which he could have discovered; for instance, the omission to look into a box for instruments, which no human prudence would have suggested, will not prevent a Bill of Review: but this application proposes new evidence in support of a case, not upon the Record, which might have been put upon the Record, upon the extremely dangerous ground, attending to the contents of the original and Supplemental Bills, that the party and his Solicitor did not know, that those persons did claim a joint interest with Keighly.

Though I feel great reluctance in adhering to the rule of the Court, where it may probably exclude the justice of the case, there is too much difficulty in the way of this application: where it appears upon the original and supplemental Bills, that relief might probably have been effectually asked, which has not been asked by either.

The Petition was dismissed (1).

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SEE, *ante*, the notes to S. C., 15 V. 557.

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(1) See *post*, *Perry v. Phelps*, vol. xvii. 173.

## DE MINCKUITZ v. UDNEY.

[1809, Nov. 27; Dec. 11.]

PLEA, filed under an Order for time to answer, regular.

THE Defendant having obtained Orders for a month and three weeks' time to answer upon the usual motion, put in a plea: the Order, as drawn, being confined to an answer. A motion was made to take the plea off the file, as irregular.

Mr. *William Agar*, for the Plaintiff, in support of the Motion, cited the case *Taylor v. Milner* (1); observing, that this is in the nature of a Plea in Abatement: viz. that the Plaintiff has taken the benefit of an Insolvent Act.

Mr. *Johnson*, for the Defendant.

The case of *Taylor v. Milner* was upon a Demurrer; but a plea, being put in upon oath, is in truth an answer, within the strict, literal, interpretation of the Order, which however has been always understood in a larger sense. This point was before Lord Thurlow, who considered all the cases, in *Roberts v. Hartley* (2); and the plea was held sufficient.

Mr. *William Agar*, in reply, admitting, that there might be a plea very much in the nature of an answer, insisted, that such a plea as this, being merely a Plea in Abatement, cannot be a compliance with an Order to answer.

Dec. 11th. \*The Lord CHANCELLOR [ELDON].—I have [\* 356] looked into all the authorities upon this question; and, if my expressions, as they appear in the case of *Taylor v. Milner*, are to be taken in the latitude, in which they may be understood, I think they go too far; as though, if I had to settle this practice originally, I should not have held a plea to be an answer within the meaning of an Order for time to answer, I cannot contradict the numerous authorities, that it is to be so considered. This Plea is therefore regularly filed.

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1. In many cases, practice gives a construction to the word "answer:" *Curzon v. De la Zouch*, 1 Swanst. 192. And practice has established, as a general rule, that putting in a plea is a sufficient compliance with the conditions of an order for time to answer: *Jones v. Earl of Strafford*, 3 P. Wms. 81; *Anonymous case*, 2 P. Wms. 464; *Roberts v. Hartley*, 1 Brown, 56, S. C., 2 Dick. 554: but a plaintiff is entitled to a complete answer, before he can be put to his election, whether he will proceed at law or in equity: *Browne v. Poyntz*, 3 Mad. 25: and, if exceptions be taken to the answer in due time, the course of the court is to wait the result of the reference for insufficiency; ordering the plaintiff, however, to procure the Master's report within a short limited time: *Hogue v. Curtis*, 1 Jac. & Walk. 450. But, if exceptions be not taken to the answer, within eight days after it is put in, it is to be assumed that the plaintiff is satisfied with the answer; and the defendant may then move that the plaintiff may be put to his election; nor can the plain-

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(1) *Ante*, vol. x. 444; see *Lansdown v. Elderton*, viii. 526; and the note, 527.

(2) 1 Bro. C. C. 56.

tiff afterwards suspend the order for election, by moving, as of course, after the eight days, for leave to file exceptions *nunc pro tunc*. His application for this purpose must be special: *Coupland v. Bradock*, 3 Mad. 16. It is obvious that, where the defendant's avowed object is to put the plaintiff to his election in what court he will proceed, it would be quite inconsistent to hold that a plea (which, as far as it extends, denies that the plaintiff has any right to proceed in equity, at all events) should, for such a purpose, be considered as an answer: *Fisher v. Mee*, 3 Meriv. 45. And a plea that the plaintiff has been outlawed, where the alleged outlawry was in any suit for the same matter, touching which relief is sought by the bill so pleaded, not only will never be held a sufficient answer, but will be disallowed, of course, as being put in merely for delay: *Phillips v. Gibbons*, 1 Ves. & Beat. 185. Lord Clarendon's order is express on this head: see Beames' Ord. in Cha. 175. A defendant may plead after the return of a simple attachment for want of an answer (*Hamilton v. Hibbert*, 2 Sim. & Stu. 225) or even after an attachment with proclamations is returnable, provided the sheriff has not actually returned it: *Sanders v. Murney*, 2 Sim. & Stu. 226; *Lloyd v. Gunter*, 1 Vern. 275; *Newton v. Dent*, 1 Dick. 335.

2. That, where a bill becomes defective, by the assignment of the plaintiff's interest, under a commission of bankrupt, the assignee must be made a party within a limited time, or the bill will be dismissed, see, *ante*, the note to *Williams v. Kinder*, 4 V. 387.

### INNES v. JACKSON.

### JACKSON v. INNES.

[1809, Dec. 8, 12, 13, 18.]

HUSBAND and wife, seised under the settlement for their lives successively with remainders in strict settlement, and to the heirs of the wife, having no issue, joined in a mortgage, by Fine, declaring the ultimate Use to the survivor. Declaration, or clear intention, equivalent to it, is necessary to change the Use; and, no purpose appearing beyond the mortgage, the title of the wife was established against a claim under the husband surviving: but the Decree was reversed in the House of Lords.

Plaintiff cannot put off the cause for defect of parties without consent, or a special ground; as, that he was not aware of the existence of such parties (a).

By indentures of lease and release, dated the 17th and 18th of July, 1743, previous to the marriage of Richard Jackson and Ann Willoughby, it was witnessed, that in consideration of the marriage, and for securing a competent provision for Ann Willoughby and the issue, and for settling the several lands, &c. after mentioned, to the uses &c. after mentioned, Ann Willoughby conveyed to Gilbert Jackson and Thomas Lisle and their heirs two farms, at East Knoyle, called Lye Farm and Burnthouse Farm, of which she

[\* 357] Ann Willoughby \* was seised in fee-simple, and all other her real estate therein mentioned, to hold to them, their heirs and assigns, to the uses, &c. after declared: viz. to the use of Ann Willoughby, her heirs and assigns, until the marriage; and, after the marriage, as to Lye Farm and Burnthouse Farm, to the use of Richard Jackson for his life, without impeachment of waste; with

(a) 2 Madd. Ch. Pr. 175; 1 Smith, Ch. Pr. 410; 1 Barbour, Ch. Pr. b. 1, c. 11 § 2, p. 320.

remainder to trustees to preserve contingent remainders : remainder to Ann Willoughby for life, without impeachment of waste : remainder to trustees to preserve contingent remainders : remainder to the first and other sons in tail male : remainder to the daughters, as tenants in common in tail ; remainder to the use of Ann Willoughby, her heirs and assigns for ever. Other premises, situated in Shaftesbury, were settled upon the trusts, afterwards declared concerning certain leasehold and mortgaged premises ; and, as to the South Sea Annuities, a trust was declared for Ann Willoughby until the marriage ; and afterwards to permit her husband to receive the dividends during his life ; and after his decease to permit his wife to receive the dividends for life ; and after her decease to divide the stock among the younger children of the marriage in equal proportions ; and in case there should be no younger children, to the person or persons, who, at the decease of Richard Jackson and Ann Willoughby should be entitled to the said premises at East Knoyle by virtue of the uses aforesaid.

The settlement contained a proviso, that it should be lawful for Richard Jackson and Ann Willoughby during their joint lives by any deed or deeds, writing or writings, under their hands and seals, and executed by them in the presence of two or more credible witnesses, to alter or revoke all or any of the uses, before limited, of said farms and premises at East Knoyle, and to limit any new uses \* in lieu thereof. The same power was given as to the [\*358] stock. Powers of leasing were also given to the husband and wife ; and for a separate provision for her she conveyed to the same trustees certain premises described, and all other her real, leasehold, and personal, estate, in trust for her sole and separate use, subject to a power of appointment by her ; and in default of appointment, for the wife, her heirs, executors, &c.

All the issue of the marriage died infants during the lives of their parents. By Indentures, dated the 25th of November, 1745, Richard Jackson and his wife demised the Lye Farm and the Burnthouse Farm for one thousand years, to be void on payment by Jackson, and Ann, his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, of 200*l.*, lent to Richard Jackson by Child, with interest. Richard Jackson afterwards borrowed 400*l.* more from Child ; which sum also was by indentures, dated the 31st of December, 1745, and the 1st of January, 1746, charged upon the same premises for the residue of the term ; with a similar proviso for redemption by Richard and Ann Jackson, &c. Jackson and his wife also covenanted to levy a fine ; which, it was declared, should enure to Child during the term ; subject to the said proviso ; and after the expiration or sooner determination of the term, to the use of Jackson and his wife for their lives, and the life of the survivor, and after both their deceases to the use of the heirs of their bodies, and, for default of such issue, to the right heirs of the survivor of Jackson and his wife ; with covenant for farther assurance.

A fine was levied accordingly. Richard Jackson afterwards paid

off the mortgage ; and took an assignment of the term, and a reconveyance of the estate to himself in fee. Ann Jackson died [\* 359] in 1772 without issue ; leaving \* her husband surviving ; and John Cooth, her heir at law, who died in 1776 ; leaving Charles, his eldest, and Edmond, his second, sons. Charles Cooth borrowed 600*l.* from Richard Jackson ; to secure which sum by indentures, dated the 15th and 16th of January, 1784, reciting, that the premises, after mentioned, would descend to Charles Cooth after the death of Richard Jackson, who was entitled thereto for his life, as tenant by the courtesy, Charles Cooth granted the reversion of the Lye and Burnthouse Farms to Jackson and his heirs, subject to redemption on payment of 600*l.* and interest.

Charles Cooth, not having paid the mortgage, died in 1786, without issue ; leaving his brother Edmond his heir at law ; and having by his Will, dated in 1782, devised all his reversionary interest in the Lye Farm to Hester Bower, her heirs and assigns ; whom he appointed his executrix. Richard Jackson died in 1796 : having by his Will, dated in 1795, devised all his lands in East Knoyle to the Defendant Gilbert Jackson, in fee-simple, charged with some annuities. Hester Bower died ; leaving the Plaintiff Innes her heir at law.

The Bill in the first cause was filed by Innes and Edmond Cooth ; praying an account and redemption, and a reconveyance by Gilbert Jackson of the Lye Farm to the Plaintiff Innes, and of the Burnthouse Farm to the Plaintiff Cooth ; suggesting that the reservation of the equi. of redemption by the indentures of 1746 to the survivor of Richard Jackson and Ann, his wife, was a mistake or inadvertence of the person, who prepared the deed ; or an imposition on Ann Jackson ; as she had no intention of parting with the inheritance of her estate farther than to assist her husband in making a security to Child for the loan of 400*l.*

[\* 360] \* The Defendant Gilbert Jackson by his Answer represented, that the object of the fine was, beyond the mortgage, for the purpose also of destroying the ultimate limitation to the heirs of Ann Jackson ; that the mortgage to Child having been paid off by Richard Jackson in 1754, chirograph of the fine and indenture of 1746 were delivered up to Richard Jackson ; and were afterwards lost or mislaid by him ; and were missing for a great number of years ; that Richard Jackson, during the whole time they were missing, apprehended, that for want of them, the premises would descend to the heir of Ann Jackson ; as if the fine had not been levied, or the deed executed ; and under that mistake the mortgage was taken from Charles Cooth ; insisting, that, as that mortgage was executed under mistake, and with the idea, that, if the deeds should not be found, Cooth would be entitled, and, as they have been since found, and are now in the Defendant's custody, the said mortgage was void ; and the Plaintiffs have no right of redemption.

The Cross Bill, filed by the Defendant Gilbert Jackson, repre-

sented that Richard and Ann Jackson, in January, 1746, agreed to revoke their former uses in their marriage settlement respecting the mortgaged premises; and to resettle the same; and that having about the same time occasion for the farther sum of 400*l.*, they borrowed that sum from Child; and Jackson also executed a bond and warrant to Child for the sum of 600*l.* The Cross Bill farther stated, that Ann Jackson by her Will, dated the 16th of December, 1770, and duly executed, gave and devised to her husband Richard Jackson, his heirs and assigns forever, all her estate, real and personal, to be entirely at his disposal after her decease, by deed, will, or otherwise, as he shall think fit; and she did thereby bar all her right, claim, &c. as far as in her lay, against all other persons whatsoever; leaving him said Richard Jackson \*her sole [\* 361] executor and possessor in fee of all, that she should die possessed of, or in any wise entitled to.

The prayer of the Cross Bill was that the mortgage of 1784 may be declared to have been executed by Richard Jackson under such mistake, as before-mentioned, and to have been afterwards abandoned and given up; and that the Defendant may be decreed to deliver up the deeds, to be cancelled, and assign the term.

An objection was taken by the Plaintiff in the cross cause; on the ground, that there was another person, entitled as heir to the Lye estate, who was not made a party: the Defendants in that cause on the other hand against the suggestion, that it should stand over, insisting, that this objection always comes from a Defendant; and formerly the Bill was dismissed: but the modern practice has relaxed that strictness; permitting the Plaintiff to amend on payment of the costs of the day; but a Plaintiff, bringing his cause to a hearing without proper parties, cannot put it off without consent; the Defendant has a right to have his cause heard; and the Plaintiff must either proceed with the record, as it is, or to have his Bill dismissed.

The Lord CHANCELLOR [ELDON].—I do not know an instance of permitting a Plaintiff to take an objection for want of parties against the will of the Defendant: a practice, which would strike at the root of all the principles, by which testimony has been guarded in this Court. Cases of exception may occur, where, for instance, the Plaintiff was not aware of the existence of persons, whose claims could touch the interests of those who are upon the record: but that ought to be clearly established; and the Plaintiff ought to apply, as soon as \*he has obtained that knowledge. [\* 362] These parties are therefore entitled to insist, that the cross cause shall proceed.

Mr. Richards, Sir Samuel Romilly, and Mr. Heald, for the Plaintiffs in the original cause.

The Equity of the Plaintiffs in the original suit is, that no intention to change the use is shown by recital, or otherwise: an intention, which must have been known to the husband of Mrs. Jackson;

whose acts are perfectly inconsistent with the knowledge of it. There is no distinction upon the ultimate limitation of the uses of of the fine to the survivor of the husband and wife. The earliest case upon this subject is *Broad v. Broad* (1): a very imperfect note certainly; and there are several old cases to the same effect: viz. that, where a married woman has joined in a conveyance by fine of her estate, and the Equity of redemption is reserved to the husband alone, yet there is a resulting trust for the wife: the operation of the fine so levied, not extending beyond the special purpose: either to let in any other incumbrance; or to exclude the future interest of the wife: no agreement or intention appearing to displace her interest farther, or to give any other interest to him. Another class of cases is, where the wife joins in a mortgage of her estate for her husband's debts; reserving the equity of redemption to herself: she shall be a creditor upon the husband's estate. That was decided in *Clinton v. Hooper* (2); where all the authorities on the subject are collected; and the result is, that, though the wife appears in the most solemn manner to have encumbered her estate for her husband's debt, the presumption is, that she meant to stand [\* 363] as a creditor: an agreement to that effect, not appearing, but being presumed. The principle of that clear doctrine applies to these circumstances; affording the inference of an agreement, that the limitations were to remain, as they previously stood. This must be determined upon the same principle, as if Doctor Jackson, having a son, had levied a fine, and left the estate to a stranger; could he thus through the medium of mortgage make himself tenant in tail, and acquire the right of immediately vesting in himself the whole estate? Those, who represent the wife, have the same right to have the estate brought back, as the children would have had in that case. Here is no evidence of an intention to carry the fine farther than the object of creating a security to Child, the mortgagee: on the contrary all the positive evidence is against that: the fine to be levied upon the request of Child, his executors, &c. The conclusion upon the deed is, either that the parties were ignorant of the limitations of the settlement, or that an imposition was practiced upon the wife by the representation, that a fine was necessary, instead of a deed of revocation; by which her attention would have been called to the terms of the settlement, and the consequence of going farther than to let in the mortgage.

Sir Arthur Piggot, Mr. Leach, and Mr. Daniell, for the Defendant in the original cause.—The evidence of the Plaintiff's pedigree is very loose; consisting merely of understanding and belief; unsupported by any reason; not referring to declarations of particular persons, competent to make such declarations; which certainly may be evidence upon a question of this description. As to the princi-

(1) 2 Ch. Ca. 98, 161; 1 Eq. Ca. Ab. 222.

(2) 3 Bro. C. C. 201; *ante*, vol. i. 173.

pal question, the authorities, referred to, reach this case. This is an attempt to extend that doctrine to an express limitation, after the determination \* of the estate, created for the purpose of the mortgage, to various uses: not in the form of a reservation of the equity of redemption; not by words, which would give a right to call for a redemption; but by a substantive settlement of the estate by persons, having complete power to change the original uses; forming an essential distinction from all the cases, that have been mentioned. The proviso for the cessation of the term on payment of the money cannot receive a construction, inconsistent with all other parts of the deed. That provision regarded only one object, the mortgage. The mortgagee might have had a perfect security, without a fine, under the power to alter or revoke the uses, and to limit new uses. The settlement of this estate, which the Court is required to strike out of this deed, by turning the person, who has the legal estate, into a trustee for the original uses, commences from and after the expiration or sooner determination of the term; and is not connected with the redemption of the mortgage. Has any case yet occurred, in which, after providing all, that was necessary for the security of the mortgagee; there was an ultimate limitation of new uses to the husband and wife for their lives, and to the heirs of their bodies, and the right heirs of the survivor? What other intention than to resettle the estate can be ascribed to them? That intention was not to be collected in the cases, that have occurred, from a mere reservation of the equity of redemption to the husband and wife and their heirs. When this transaction took place, the contract of marriage, not three years before, could not have been forgotten; and can this special limitation to the survivor, after payment of the mortgage, and the determination of the mortgagee's interest, making the benefit depend upon accident, be accounted for by the simple purpose to create a mortgage, and not to affect the subsisting uses farther? The act shows the intention as \* effectually as any recital. The [\* 365] claim even of a child under the old uses could not be sustained against this complete revocation, the clear effect of their deliberate purpose. In the case of *Clinton v. Hooper* (1) the question was, not upon the wife's title, but upon the right to exoneration, and the admission of evidence to rebut the inference; and in all the cases, previous and subsequent, the question was only as to the purpose and intent, to which the wife's estate was pledged.

The letters of the Defendant, which have been read by the Plaintiffs, acknowledging the title of the heir at law of Mrs. Jackson, are considered as inconsistent with the claim, now set up by the Defendant; and to that evidence is added his acceptance of a mortgage of that very reversion from the heir; which is considered as decisive. All this admits explanation; and may be attributed to mistake, inadvertence, and surprise. The letters show complete forgetfulness of

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(1) *Ante*, vol. i. 173; 3 Bro. C. C. 201.



all that had passed ; the husband, not recollecting that he was tenant for life under the marriage settlement, speaks of himself as heir of his children ; meaning his title, as tenant by the courtesy.

In reply, upon the objection to the evidence of pedigree it was urged, that though a stranger to the family must state the ground of his belief, and from what member of, or person connected with, the family, it was derived ; it is sufficient for a member of the family to say, that he frequently heard the family talked of, and he believes the fact. If the witness should be bound to state the person, from whom, and the occasion, on which, he formed his belief,  
 [\* 366] \* the best evidence of this species would be destroyed ; as no such person can be expected to specify those particulars : the knowledge, acquired by a member of the family, arising, not from direct declaration, but from hearing the circumstances talked of and believed in the family.

*Dec. 18th.* The Lord CHANCELLOR (1) [ELDON].—The first transaction, upon which the question in this cause arises, is the mortgage in 1745 of the East Knoyle estate ; and the deed, creating that mortgage, is drawn at least with great ignorance ; as, if the person, who drew that instrument, was apprised of the settlement, it was proper, that the existence of it should be more declared, than it appears to have been, to the person, who was to advance his money. The effect of that transaction is really no more than a demise during the husband's life ; though, in order that the mortgagee might have his money secured, this Court would, rather than that the mortgage should not be available, have held it a good execution of the power of revocation, reserved by the settlement. The proviso for redemption, declaring, that if the mortgagor and his wife, or either of them, their or either of their heirs, executors, &c. shall by a certain day pay the sum of 200*l.* and interest, then the term is to cease, does not state, whether there is to be any re-assignment. There is a covenant, that they are the lawful proprietors seised of the absolute and indefeasible estate of inheritance ; and a covenant for farther assurance, in terms, amounting to an agreement for levying a fine ; just as if it had been so expressed : and, if the mortgagee's title would not have been good without a fine, I apprehend, an action  
 [\* 367] \* might have been maintained by him upon that covenant : or upon the principle of a certain class of cases perhaps this Court would have decreed the husband to procure his wife to join in levying a fine (2).

The first point to be considered is, what is the effect of this instrument. I take it to be, as far as it goes, a revocation of the uses of the settlement. I do not think it can be contended, that, as the proviso for repayment of the mortgage-money is by the husband, the result

(1) The Judgment is taken from a short-hand writer's notes.

(2) See these cases, and the difficulties upon that doctrine, considered by the Lord Chancellor in *Emery v. Wase* ; *ante*, vol. viii. 505, and the note, i. 329.

in Equity would be more than this ; (supposing nothing else to have been done) : that all the uses and trusts of the marriage settlement would revive, and take effect as if they had never been displaced ; and, unless I am mistaken in the doctrine upon this subject, which, I confess, has been handed down to me by tradition rather than derived from any authorities, that I have been able to trace, I think, it would have made no difference whatsoever, if this had been a proviso, not merely that the term should cease : but that it should be re-assigned to Dr. Jackson.

The doctrine of this Court I take to be, that, if the intention is to make a mortgage of the wife's estate, that intention shall govern the parties ; and the Equity of redemption shall belong to the person, who had the estate before : so as to give back the inheritance to those, from whom it came : exactly as when a man makes a mortgage of his own estate ; and the proviso for redemption is to him and the heirs of his body ; falling short of the description of persons, who would have taken the inheritance originally before the mortgage.

\* This deed having been executed, and the subsequent [\* 368] mortgage in 1746, whether any thing farther passed with regard to these estates, I know not. With regard to the money property it is clear, that some transaction had taken place, previous to the year 1749. It appears, that at some period, not ascertained, but referred to by an instrument, executed in that year, the power of revocation was exercised as to that property ; the trusts of which were revoked : so that it no longer stood upon the trusts, declared for the husband and wife and the children : but, these original trusts being revoked, a new trust had been declared for the husband and wife and the survivor of them : excluding the children in any character ; either as purchasers, children, or issue. The money, having come to the hands of Dr. Jackson, was by him applied to the purchase of copyhold estates ; the uses of which were declared to the husband and wife and the survivor of them.

It was contended, that there must have been an intention in these parties to alter the uses of the East Knoyle estate in the same way. The deed of 1749 certainly professes this ; that in that year they did not mean, that the money should go, as they intended it to go in 1743 : but in any way of putting it the deed of 1749 does not show, that they had the same intention of altering the uses of the East Knoyle estate under the settlement of 1746 : which professes an intention of altering the former uses ; leaving the interest of the children unaffected. The deed of 1749 cuts off the children altogether ; operating such an alteration in the uses of the settlement with regard to the money as left the children without any claim, except what they might naturally hope to derive from parental affection : in fact wholly divesting their interest. Besides, though under an instrument, which on the face of it is an execution of a power of revocation \* and professes to limit new uses, to the extent, in which [\* 369] new uses are declared by it, they will arise, it does not

follow, that new uses will be created in a mortgage transaction : nothing more appearing on the face of it to have been intended than the primary object of borrowing the money.

In 1746 the mortgage, on which so much of the argument has turned, was made; and, let the state of facts be raised as high as they will admit, the real question in this cause is, what this Court ought to have decided as between Dr. Jackson and the heir of his wife, if the parties had, when she died, come before the Court with both these instruments. The Mortgage Deed of 1746 gives Child, the mortgagee, no sort of information as to the marriage settlement; and has not the least reference to it. The indenture of the 25th of November, 1745, is recited in terms; not indeed detailing all the covenants: the Deed then recites, that the sum of 200*l.* was not paid according to the proviso for redemption; and that Child's interest had thereby become absolute in law. The payment being to be made on a day certain, the term could not cease under that proviso; but could be got rid of only by re-assignment. Dr. Jackson and his wife are then stated to have occasion for the farther sum of 400*l.*; and, to secure those two sums of 200*l.* and 400*l.* they grant, release, ratify, and confirm, to Child, his executors, &c. the premises, in the recited indenture of mortgage granted, for the remainder of the term of one thousand years; subject to a proviso, that if Dr. Jackson and his wife, or either of them, their heirs, executors, &c. shall pay the sum of 600*l.* to Child, his executors, &c. on the 1st of July next, then these presents, and every article, &c. shall cease, determine, and be absolutely void.

[\*370] \* Looking no farther into this Deed, this is a good execution of the power, contained in the settlement, as between the mortgagor and the person, who was advancing his money; and although this Deed reserved the equity of redemption to the heirs, such reservation would not alter the beneficial interest of the husband or wife. If the husband had the beneficial interest by surviving the wife, or she had the beneficial interest by surviving him, that interest would not have been varied by reserving the equity of redemption to them and their heirs: but, supposing the mortgage to have been paid off, they would have taken the beneficial interest in the same way, as if this mortgage had not been made; and their children's title would have been restored; and maintained in equity.

We come then to the distinction, which has been very ably argued at the bar; to illustrate which let us take the case of a mortgage of the wife's estate; and the contract may assume various forms upon the face of the instrument: yet, if it operates no more, I apprehend, this Court will fix the beneficial interest in the person, who would have had it, if the mortgage had not been made. The mortgagee may under the proviso for redemption be authorized in making the reconveyance to the husband and his heirs; and yet that would not exclude the persons, interested in the inheritance. Where the wife's estate is mortgaged, it is of necessity, that there should be a covenant to levy a fine; and, whether it is levied, or not, the

agreement is, generally, evidence of an intention to do something with the estate. If the object is to be collected from the covenant, it is to enure to the husband and wife and their heirs: but I do not say, that the limitation may not be so expressed as to amount to more of evidence of an intention to effect a change of the beneficial interest, than that the limitation of the wife's estate should \*be to the heirs of the wife: and the question must [\*371] at last come to this; whether, taking the whole transaction together, as connected with this instrument, any thing more was meant than that it should be a mortgage transaction. It appears to me to be no more than a blundering mode of executing a mortgage. The only object of the covenant to levy a fine appears to be to secure the mortgage money; and can a fine, to be levied at the request of a mortgagee, for his security, have the effect of a revocation of the uses of a settlement, and a declaration of new uses; altering the interests of the wife and family in her estate? The question is reduced to this: whether there is apparent on the face of the Deed a declaration of intention to do something more than merely to make a mortgage; or that clear manifestation of such intention, which may be represented as equivalent to such a declaration? My opinion is, that there is not; that there is no part of this Deed, which shows any purpose beyond that of making a mortgage.

In this view of the case I am strongly impressed with the opinion, that, if the Court had been called upon in 1772 to decide, where the beneficial interest of this property was, the declaration must have been, that it was in the wife, or in the heirs of the wife. I do not think, that any thing has been done since that period, which can make any difference with respect to the question, as it then stood.

The Decree, accordingly declaring the Defendant a trustee for the Plaintiffs, respectively, was reversed on Appeal to the House of Lords, with the concurrence of Lord Eldon, C., July 10th, 1819.

1. THE decree made in these causes was reversed by the judgment of the House of Lords: see 1 Bligh, 104–136. The reversal establishes, that, where a husband and wife join in a mortgage of lands in settlement, although the equity of redemption be reserved to the husband and his heirs, still, if there be no appearance of an intention to resettle the estate, and alter the previous rights, the right of redemption will belong only to those who are entitled under the settlement, and not to the heirs of the husband; but, where an intention to make a new settlement appears, that intention will prevail: and it is not necessary there should be in the recitals of the instrument any distinct expression of such a meaning, if it can be clearly collected from the nature of the new limitations, or other sufficient circumstances independent of the reservation itself: see *Martin v. Mitchell*, 2 Jac. & Walk. 424; *Reeves v. Hicks*, 2 Sim. & Stu. 408.

2. In Mr. Vesey's report of the principal case, it is stated, that Jackson, when he paid off the mortgage, took an assignment of the term; but that statement is corrected in 1 Bligh, 107.

3. As to the virtual compulsion exercised against a wife, when her husband is decreed to procure her to join in the completion of a title, see, *ante*, note 4 to *Emery v. Wase*, 5 V. 846; and, as to the manner in which the question of costs was disposed of, in the principal case, see *Gowland v. De Faria*, 17 Ves. 26.

## MACKENZIE v. MACKENZIE.

[1809, FEB. 4.]

THOUGH an agreement for a composition, generally, is not binding on the creditor, unless absolutely and strictly fulfilled, a bond-creditor, having concurred in a general resolution for a composition, to be secured by notes, was under the circumstances, with reference to the interest of the other creditors, restrained from taking execution in an Action upon the bond, on non-payment of the notes, beyond the terms of the composition (a).

THE Plaintiff and his three partners, being indebted to the Defendant in 9,080*l.* 19*s.* 4*d.* on balance of accounts, of which 8,540*l.* was secured by their covenant, and six bonds, payable by seven instalments of 1,220*l.* each, called a meeting of their creditors in January 1807; at which time all the instalments, except the last, had become due; and had been carried, by consent, to the credit of the Defendant's account. On the 7th of February, 1807, the creditors came to a general resolution, to accept a composition of ten shillings in the pound on their debts, to be paid by five instalments at the respective periods of 12, 18, 24, 30, and 36 months; to be secured by four joint promissory notes of the Plaintiff, and one of the other partners; and the last instalment to be secured by a similar note, made payable to some person, to be approved by the creditors; who should indorse the same as a security. The Defendant concurred in, and promoted, that arrangement; and in May 1807, received the four notes for 908*l.* 2*s.* each. No communication passed respecting the fifth note before the 9th of March, 1808, when the first note became due; which not being paid, the Defendant in April offered to deliver up the bonds, and accept the fifth note without security, if the Plaintiff would pay the note then due; but, not obtaining payment, brought an action on the bonds; and on the 23d of May the Plaintiff paid the note with interest; and the Defendant gave up the note, as satisfied; but insisted on his right to enforce the bonds. On the 11th of June, 1808, the Plaintiff inclosed the fifth note, without security, to the Defendant's Solicitor; who returned it; insisting, that the Defendant

[\* 373] ant was not bound to receive it. \* On the 17th of August the Plaintiff's Solicitor, by letter, proposed a person as security for the fifth note; to which letter no answer was returned; but the second note having become due on the 9th, and not being paid, the Defendant's Solicitor on the 24th September wrote to the Plaintiff's Solicitor; stating, that the Defendant did not object to the security proposed; but, as the second note was not paid, the Defendant would not acquiesce in the composition.

The Defendant accordingly brought an action at Law upon the six bonds, and the Bill was filed for an Injunction; praying also, that

• (a) In transactions of this sort, the utmost good faith is required; and all secret arrangements securing peculiar privileges to certain creditors are void, even against the assenting debtor, or his sureties or friends. See *ante*, note (a) *Eastbrook v. Scott*, 3 V. 456; 1 Story, Eq. Jur. § 378, 379; 1 Madd. Ch. Pr. 32.

the Defendant may be compelled to accept the security, proposed for the fifth note; and deliver up the deed and bonds to be cancelled; or to release Plaintiff from the same.

The Defendant by his Answer insisted that the Plaintiff put an end to the resolution and agreement, or waived, or abandoned it, by non-payment of the first and second notes, and not giving the fifth note; and submitted, that the resolution was therefore not binding upon him.

Mr. Thomson and Mr. Treslove, for the Plaintiff, in support of the Motion for an Injunction.—The Defendant has bound himself by the resolution to the rest of Plaintiff's creditors, as well as to the Plaintiff; and, having influenced others to acquiesce in it, cannot now contend, that he was not bound; and by his action at Law sweep away the effects from the other creditors; who have been induced to release their debts. The resolution, expressing, that the instalments were to be secured, implies, that the creditors were to depend on that security; and in that respect this case is distinguished from those, \* where non-payment of a composition [\* 374] at the precise time stipulated put an end to the agreement. The clear effect of this contract is, that on giving the notes the bonds shall be delivered up.

Sir Samuel Romilly and Mr. Cooke, for the Defendant.—In the case of composition, a creditor agreeing to take less than his debt, time is of the utmost importance; and the interests of the other creditors are not to be considered. In *Sewell v. Musson* (1) the reason is stated; that the creditor has a right to prescribe the condition of his indulgence. Until the debtor has strictly performed his part of the agreement, the creditor is not bound: *Heathcote v. Crookshanks* (2). This agreement has not been fulfilled by the Plaintiff. The fifth note has not been delivered. All the notes were to be given at the same time. The Defendant on receiving the money, due on the first note, expressly stated, that he did not abandon the bonds. The second note has not been paid: nor does the Bill offer payment.

The Lord CHANCELLOR [ELDON].—My decision upon this motion will not in any degree break in upon the principle, that a creditor, having entered into an agreement for a composition, is not bound to take less than his debt, unless that agreement shall be absolutely and strictly fulfilled (3). This case is constituted of circumstances requiring much attention, beyond what would be due to that simple case. The question is to be considered with reference, not only to the individuals, who are parties to the agreement, but to the other creditors also: whether, attending to the actual nature and faith of the transaction, it is competent to this creditor to resort \* to his original debt; giving the other creditors reason to [\* 375]

(1) 1 Vern. 210; 1 Ch. Ca. 110; Amb. 332.

(2) 2 Term. Rep. 24.

(3) *Ex parte Bennet*, 2 Atk. 527. See as to that case, *post*, vol. xix. 100, the note to *Ex parte Vere*.

complain of a breach of the condition, under which they had agreed to accept a composition, if this creditor should retain a demand for his whole debt. If there is any principle for relieving against immediate payment, it arises out of the interest of the other creditors. The justice, due to them, requires the interposition of a Court of Equity to relieve against an action, which, except upon equitable principles, could not be resisted; supposing, which is not clear, if such a use of the bonds would be considered fraudulent, that the Defendant would not have had a sufficient plea at Law. It is said, the action ought to be brought against the other partners also: but then, the bonds being joint and several, a separate execution might have been taken; and, if the parties have dealt so, that one could recover at Law, a Court of Equity has only to take care, that no use shall be made of that power at Law to the prejudice of other creditors. Upon that principle the conclusion is, that this creditor cannot compel payment of more than would have been due upon the notes. Execution must be restrained accordingly to the instalments due upon the notes; and the fifth note must be delivered to the Defendant(1).

SEE, notes 1, 2, to *Eastabrook v. Scott*, 3 V. 456.

## DAY v. MERRY.

*The MASTER of the ROLLS for the LORD CHANCELLOR.*

[1810, JAN. 15.]

INJUNCTION against cutting ornamental timber, upon the principle of equitable waste, extended to trees, planted for the purpose of excluding objects from view.

A MOTION was made upon the Bill of the remainder-man in fee against the tenant for life, without impeachment of waste, [\* 376] to restrain the Defendant from \*cutting ornamental timber, upon the principle of equitable waste.

Sir *Samuel Romilly*, in support of the Motion, admitting, that it was new, as far as it applied to trees, planted for the purpose of excluding objects from view, contended, that they were within the principle, upon which those Injunctions had been granted (2).

The Order was made accordingly.

As to the doctrine of "equitable waste," see, *ante*, note 4 to *Pigot v. Bullock*, 1 V. 479.

(1) In *Geach v. Ames*, (mss. Mr. Beames, Excheq. 10th Dec. 1823,) after default in paying an instalment under a composition the creditor had received payments. The Court on the ground of fraud established the composition, and granted a perpetual Injunction against the creditor on payment of the instalments remaining due.

(2) *Chamberlayne v. Dummer*, 1 Bro. C. C. 166; *The Marquis of Downshire v.*

## WHELDALE v. WHELDALE.

*The MASTER of the ROLLS for the LORD CHANCELLOR.*

[1810, JAN. 15.]

DISCHARGE by *Habeas Corpus* from Commitment under an Attachment for breach of a Writ of Execution of a Decree for payment of money on account of a *Devastavit*, as Executor, committed before, though not ascertained by the Report, or decreed to be paid, till after, the time, fixed by an Insolvent Act; of which the party had taken the benefit.

THE Defendant, being in the custody of the Marshal of the King's Bench Prison in an action of debt for 190*l.*, in which action he had been committed on the 3d October, 1796, for want of bail, was in June 1809 charged with an attachment out of the Court of Chancery in this cause, indorsed for breach of a Writ of Execution of an Order in this cause for not paying 645*l.* 8*s.* 7*d.* reported due from him; and stated by the Master's Report to form the clear residue of the testator's personal estate.

\* This suit was instituted by the Plaintiff, the residuary [\* 377] legatee named in the Will of her grand-father, Thomas Wheldale, against the Defendant Thomas Wheldale, her uncle, and sole executor of the said Thomas Wheldale deceased; praying an account of the testator's personal estate; and that the residue may be secured for the Plaintiff's benefit.

The Defendant, by his answer, admitted the probate of the Will; and stated, that, being an officer, and chiefly employed abroad, he had left the management of the testator's affairs to John Wheldale, the Defendant's brother, and father of the Plaintiff, and to the testator's attorney and confidential friend; and that he had permitted the said John Wheldale to take the stock on the testator's farm, and other parts of his property at certain prices, fixed by indifferent persons, amounting to 645*l.* 8*s.* 7*d.*; for which the said John Wheldale executed a bond to the Defendant, dated the 16th April, 1795.

The answer farther stated, that the said John Wheldale became a bankrupt on the 14th of July, 1798; and that the Defendant had proved the bond, and received 36*l.* for a dividend, under the Commission.

The Defendant did not appear at the hearing of the cause; and the Plaintiff took a Decree for the usual account; and that the Master should ascertain the amount of the clear residue of the testator's personal estate.

The Master by his Report, dated 27th February, 1809, found the several facts, above stated from the answer; and that he had charged the Defendant Thomas Wheldale with the 645*l.* 8*s.* 7*d.*; which sum formed the amount of the clear residue of the testator's personal estate.

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*Lady Sandys, Lord Tamworth v. Lord Ferrers, ante*, vol. vi. 107, 419, and the note, 110; *Williams v. M'Namara*, viii. 70.



The cause was heard on farther directions on the 4th of May, 1809; and the Defendant not appearing, a Decree was taken, that the Defendant do pay to the Plaintiff the sum of 645*l.* 8*s.* 7*d.* reported due from the Defendant, and forming the amount of the clear residue of the testator's personal estate. On the 8th June, 1809, a writ of execution of this Decree was issued; on the 10th of June, 1809, the Defendant was charged with an attachment, for breach of this writ of execution; and on the 20th June he was brought up by *Habeas Corpus*, and committed to the Fleet; and was afterwards by another *Habeas Corpus* recommitted to the King's Bench prison, charged with the process of this Court.

On the 9th of October, 1809, the Defendant took the benefit of the Insolvent Act. 49 Geo. III. c. 115, when the Court of Quarter Sessions adjudged the said prisoner to be admitted to the benefit of the said Act; and ordered, that the said Marshal should forthwith discharge the said prisoner out of his custody.

Notwithstanding this Order the Marshal did not consider himself authorized to discharge the Defendant from the attachment, issued out of this Court, and therefore he was now brought by *Habeas Corpus* before the Lord Chancellor. The only question was, whether under the circumstances of this Decree it was to be considered as a case within the provisions of the Act; which requires the debt to be due or owing before the 1st of February, 1809, whereas the final Decree for payment of this money was not made until the 4th May, 1809; and the writ of execution of the Decree was not until the 8th June.

Mr. *Cooke*, in support of the Motion, that the prisoner should be discharged, insisted, that an attachment for non-payment [\* 379] \* of money is considered as process to compel payment of a debt, and is in bankruptcy discharged by a certificate: *Baker's Case* (1). This sum of 645*l.* 8*s.* 7*d.* became a debt the moment the Devastavit was committed; which was by permitting the brother John Wheldale to possess the effects; and the Master so considered it by charging the Defendant with the whole money, as money come to his hands, and not merely with the dividend, received under the Commission against John Wheldale. Many cases have occurred, where executors became bankrupts after misapplying assets; which were always proved as debts under the Commission; although no account had been previously taken: or Decree for payment pronounced. Upon the same principle this was a debt due before the 1st February, 1809, within the meaning of the Act.

Sir *Samuel Romilly*, for the Plaintiff, opposed the Motion; contending, that the debt could not be considered as constituted at any period, previous to the Decree for payment; which was subsequent to the time, fixed by the Act.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] said, it had been otherwise held in bankruptcy, according to the cases, referred

to: the debt being considered as subsisting from the time, when it was contracted; not, when it was ascertained.

The prisoner was accordingly discharged.

AN order upon a party in a cause for payment of money constitutes an ascertained debt, and an attachment to enforce the payment is a mode of execution adopted by courts of equity for recovering such debt. An attachment having this object must not be confounded with an attachment for a mere contempt; as the process may issue for very different purposes, it by no means follows that an attachment in the nature of an execution for a debt will be discharged by the same means which would discharge an attachment for a contempt: *Bartram v. Dannett*, Rep. temp. Finch, 253: though an insolvent act, or an act of indemnity, will always receive a liberal construction in favor of the liberty of the subject: *Rex v. Stokes*, Coop. 138. An order for payment of money establishes a demand in behalf of the party to whom it is directed to be paid, which demand, if unsatisfied, may sustain a commission of bankruptcy (*Ex parte Parker*, 3 Ves. 554), or may be proved under a commission taken out by another creditor; and, as a certificate will bar such a debt, the process issued to compel payment of the debt must naturally be discharged when the debt itself is discharged: *Wall v. Atkinson*, Coop. 199.

## BERKELEY v. DAUH.

[\* 380]

*The MASTER of the ROLLS for the LORD CHANCELLOR.*

[1810, JAN. 17.]

OUTSTANDING Term, to attend the inheritance, the trusts being performed, may be an objection to the conveyance: not to the title.

AN Exception was taken by the Defendant to the Master's Report against his title, on the ground, that a term of 98 years, of which 19 years were unexpired, subject to which the Defendant was seised in fee, was outstanding in a trustee, to attend the inheritance; all the trusts being performed.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Exception to the report.—Admitting, that the purchaser is right, this is not an objection to the title. The question, who are to join in the conveyance, is a different, and a subsequent, consideration. Where the title is clear, but there are terms or incumbrances to be got in, the established course is, that the Master reports in favor of the title: a reference is then made to him to approve a conveyance; and then the question arises, whether all the parties to a proper conveyance are brought before the Court. This term, all the trusts being performed, and being to attend the inheritance, is a trust for the vendor; who has in him the whole legal and equitable interests; and therefore a good title. The uniform practice is, that, if a purchaser chooses to have a new trustee, he must bear the expense of procuring the assignment. That was assumed, without consideration certainly, in the case of *Maundrell v. Maundrell* (1); that if the purchaser

(1) *Ante*, vol. vii. 567; x. 246.

chooses to bar dower by having an assignment of the term, he must bear the expense of procuring it.

Mr. *Richards*, Mr. *Cooke*, and Mr. *Preston*, for the Plaintiff.—The ground of this objection is, that the term is vested in a lunatic: no commission has issued; and therefore there is no person competent to make the assignment. The purchaser may be exposed to very serious inconvenience from the legal estate outstanding; which may be assigned hereafter to some other person. This forms an objection to the title: the Plaintiff declining, either from necessity or choice, to give the interest, which he undertook to give, the legal estate being admitted to be in a person who cannot convey, the consequence, that the purchaser cannot have a title, is clear.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—This appears to me to be a question of conveyance, not of title. The reference to the Master was to inquire, whether the vendor can make a good title. I am at a loss to say, how he cannot; when he has vested in him, legally or equitably, all the interest in the estate. The allegation is, not that he cannot, but that he will not, make a title: i. e. that he will not do those acts, which are necessary to give a complete title to the purchaser: Mr. *Preston's* reasons for the purchaser's insisting upon an assignment of this term may be very good. That question will arise afterwards: when the Master comes to settle the conveyance: but at present the vendor has the power, provided he will take the means necessary for the purpose, of making a good title.

The Exception was allowed.

IN analogy with the opinion expressed in the principal case, as to outstanding terms, it was held, in *Boothby v. Walker*, 1 Mad. 199, that outstanding judgments and annuities, affecting an estate contracted for, are not so much an objection to the title, as to the conveyance. With respect to the cases in which a reconveyance of the legal estate (alleged by an unwilling vendee to be outstanding) will be presumed, see, *ante*, note 2 to *Cooper v. Denna*, 1 V. 565; and see note 6 to the same case, as to the practice upon a reference of title to the Master. For a short summary of the doctrine, of satisfied terms, and the importance to a purchaser that they should be actually assigned to him, see, *ante*, note 6 to *Evans v. Bicknell*, 6 V. 174.

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## SOMERVILLE v. MACKAY.

[1810, FEB. 12.]

DEFENDANT, refusing a full discovery, not by Plea or Demurrer, but by Answer, compelled to make a full Answer; and, on Motion, to produce books, &c. (a). Negative Plea (b), [p. 387.]

THE Bill in this case represented, that the Plaintiff, having been engaged in a partnership for manufacturing muslins and piece goods at Glasgow, which partnership was dissolved in 1794, entered into a treaty with the Defendant, who lived in London, for shipping goods, and executing orders to Russia upon their joint account; charging that to be the effect of the letters, that passed between them in March, 1795: and that upon the conclusion of that treaty, it was expressly understood and agreed, that neither of them should send any goods upon their separate accounts to Anderson and Co., or to any other person in Russia. The bill accordingly, upon the foundation of the contract, contained in the letters, referred to, prayed, that the Plaintiff may be declared entitled to a moiety of the profits of all goods, sent by the Plaintiff and the Defendant, or by the Defendant separately, to Russia, consigned to Anderson and Co. or to any other person: and that an account may be taken accordingly of all goods, sent upon the joint account, or by the Defendant upon his private account, to Anderson and Co. or his other agents in Russia; and of the produce of the sales.

The Defendant put in an answer; which, admitting, that the letters of the 14th and 15th of March contained the agreement for a partnership, contended, first, that it did not exclude him from trading with Anderson and Co. upon his private account: secondly, if that should be considered the effect of the agreement, that he had afterwards proposed, that he should be at liberty to do so; to which proposal the Plaintiff had consented; thirdly, that there \* was nothing in the terms of the agreement, prohibiting [\* 383] him from carrying on trade upon his private account with any other person in Russia. The Defendant insisted, as the effect of the correspondence, which continued down to 1798, that the Plaintiff submitted to a dissolution of the partnership; and it was considered as at an end. He admitted, that he made large consignments to a person, whom he had sent out to Russia; and made considerable profit thereby; not derived from the goods, sent upon the joint account; and the goods, so sent out by him to that agent, were, after the partnership was so considered at an end, sold upon

(a) It is a general rule, subject to some exceptions, that the defendant must answer fully all the allegations and charges in the Bill, and all the interrogatories founded upon them, from which he does not specifically protect himself by way of demurrer, or plea, as the case may require. Story, Eq. Pl. § 605, 606; *Methodist Epis. Church v. Jacques*, 1 Johns. Ch. 65; *Phillips v. Prevost*, 4 Johns. Ch. 205; Hare, on Discov. 247, 296, 297.

(b) See, *ante*, p. 262, note (a) *Jones v. Davis*.

the private and separate account of the Defendant ; insisting, that there was no stipulation in the terms, agreed upon for forming the partnership, which prevented that ; and, upon the letters of August and September 1795, that he had a right to consign any goods or merchandize, except muslins, upon his own account to Anderson and Co. ; that he never did during the partnership send them muslins on his private account, or any goods, before that consent was given ; and that he might during the partnership send muslins or any other goods to any other persons without the Plaintiff's consent. He admitted, that the goods, sent to Russia upon his private account, were, notwithstanding a loss upon some articles, upon the whole disposed of at a considerable profit ; and that he received several remittances in bills and money from Anderson and Co. on that account.

Exceptions to this answer being allowed, a farther answer was put in ; admitting, that the Defendant had in his possession several books and papers, relating to the goods, sent to him by Anderson and Co. and other persons in Russia on his separate account ; but submitting, that he ought not to be compelled to produce them. Ex-

ceptions being again allowed, the Defendant, by a third [\* 384] answer, \* again submitting, that for the reasons, before stated, he ought not to be compelled to give a particular account, relating to the separate trade, &c. set forth by a schedule, a list of books, containing all the letters, relating to it.

A Motion that the Defendant may be ordered within a fortnight to produce for the inspection of the Plaintiff the several books, &c. mentioned and referred to in the schedule to the second farther answer, supported by Sir *Samuel Romilly* and Mr. *Cooke*, and opposed by Sir *Arthur Piggot*, stood for judgment.

The Lord CHANCELLOR [ELDON].—It is insisted for the Defendant, that, as to some of the books and papers, the inspection of which is the object of this Motion, though a demurrer, or a plea, has not been put in, the Defendant is not bound to make any discovery as to that, which he calls his separate and private trade ; and one view of this case, as represented by the Bill, is, that, if this is really to be considered as the separate trade of the Defendant, he by art, contrivance, and misrepresentation, induced the Plaintiff to withdraw from that, which is represented as the joint trade ; and the production of the papers required would manifest, that when the Defendant represented the Russia trade to be a losing concern, he was carrying it on himself with great advantage ; and in this view the production is important. The Bill however has by no means charge enough to justify the production upon that ground ; and the only ground, upon which it can be obtained, is, that, upon the whole case, taken altogether, the Defendant cannot refuse the farther discovery ; considering what he has in fact answered.

[\* 385] \* The allegation is no more than a charge of what is contended to be the effect of the letters themselves ; that upon the conclusion of the treaty for the joint concern it was expressly

understood and agreed, that neither of them should send any goods upon their separate accounts to Russia; consigned to Anderson and Co. or to any other person; that the whole was to be joint; that this was a part of the terms of the partnership: the basis of it; as appears by the letter of March 1798. As to one of the points, made by the Defendant, if this agreement, according to its true import, as it appears upon the Bill, does not prohibit the Defendant from trading separately with Anderson and Co., or with any other person, the proper course for the Defendant seems to be a Demurrer, as to any account of the private trade: the Plaintiff having no title to discovery or relief upon that head; if not prohibited by the agreement. The Defendant, not taking that course, has made this defence by these three answers.

It is necessary to advert to the particulars of this correspondence, to see, whether it bears out the assertion, that the Defendant had the Plaintiff's leave to trade generally with Anderson and Co. to any extent, upon his separate account: not merely in a particular adventure. A proposition of the Plaintiff to wind up and put an end to the concern certainly appears: but the Defendant must show, that it was wound up, and determined. He states a letter, on the 31st of August 1795, opening a proposal to the Plaintiff, to which he expresses a strong inclination to accede, for liberty to the Defendant to trade separately with Anderson & Co. except in the article of muslins: but that does not appear to have been matured into agreement. The letter of the 17th of August, 1796, upon which the Defendant contends, that the Plaintiff submitted to a dissolution of the partnership on such \* terms as the Defendant should think proper, not having produced any answer, or communication of terms, cannot have the effect of dissolving the partnership. The Defendant's conclusion from his letter of the 16th of January 1797, and that of the Plaintiff of the 24th of January, is, that the partnership was considered as at an end: but a positive averment, that it was at an end, is necessary: the correspondence leaving that fact, and by whom it was determined, extremely doubtful; and the conclusions of the parties may have been different. [\*386]

The letter of September 1795, upon which the Defendant relies, expresses no more than that in the mean time he may, if agreeable, make up a parcel of any articles, except muslins: certainly not importing a general permission to trade in any articles, either with Anderson and Co. or with any other person. So in the letter of the 24th of August preceding, the Plaintiff says, he approves of his sending out a few boxes; not doubting they will be all Lancashire goods. It is extremely difficult to maintain upon the whole correspondence, that a general permission is given to trade with Anderson and Co. generally, for all articles, and to all time. These letters are also material, as written evidence, that the Defendant did not conceive himself to be at liberty to carry on a private, separate, trade with Anderson and Co. The letter of the 13th of August clearly shows, that

the partnership was not then dissolved: but the fair construction is, that it applies to a concern, not in progress, but not finally wound up.

The answer contends, that upon the true meaning of the agreement, contained in these letters, there is nothing, that prohibits the Defendant from sending articles of any description to any person, except Anderson and Co.; and insisting also upon the

[\*387] special permission to \*send any goods, except muslins to Anderson and Co., submits, that the Plaintiff is not entitled to the accounts prayed; and that the Defendant is not to be compelled to set forth such accounts; or to produce any books, &c.; denying, that any thing is due from him in respect of the profits; in case any profits were made by the goods, so sent by him; having before admitted, that profits were made.

The effect of the answer is this. The Defendant discovers, that he did carry on a separate trade; that he derived considerable profit from it; and has books, relating to it; but insists that he is not liable to be called on to state, what books he has. This is, not a Demurrer, as far as the Bill seeks an account of these facts, but an answer; making a partial discovery; and refusing the rest; and it recals to my mind the inconvenience, which struck me forcibly in some former cases (1). The old rule, before the time of Lord Thurlow, was either to demur; to plead, upon something *dehors* the Bill, or that sort of negative plea, of which we know more in equity than at law (2); or to answer throughout. The inconvenience of this new mode of pleading is, that the defence is not judged of by the Court in the first instance; but it goes first to the Master, upon exceptions to the answer: then to the Court upon exceptions to the Report: assuming in this instance a different shape, a motion for the production of books and papers; in substance the same; as that production can only be required upon the same principle: the

whole process being gone through, under which formerly  
[\*388] the Defendant was understood as admitting, that he \*had no such short answer to state, as would entitle him to a declaration in the first instance, whether he ought not to make any farther answer; which might leave an equity, to be decided upon at the hearing.

The course this has taken is, that exceptions to the answer were allowed; and a farther answer was put in; with an admission, that there are in his possession several books and papers, relating to the goods, so sent to Anderson and Co. and to other persons in Russia, upon his separate and private account; submitting however, that he ought not to be compelled to produce them; insisting therefore by the second answer, not in the form of a plea or demurrer, that the Plaintiff is not entitled to the discovery; which however is partially given. Exceptions were again taken; and the Master's opinion being, that the second answer was also insufficient, a third answer

(1) *Ante*, *Rowe v. Teed*, vol. xv. 372; see the notes, i. 293; xi. 42. In the Court of Exchequer, where Exceptions come immediately before the Court, the rule is the other way: *John v. Davie*, 13 Pri. 632.

(2) *Newman v. Wallis*, 2 Bro. C. C. 143. See 3 Bro. C. C. 489.

was put in ; by which the Defendant, submitting, that for the reasons, and under the circumstances before stated, he ought not to be compelled to give a particular account, relating to the trade, carried on by him separately, has however set forth in a Schedule a list of books, in which are contained all the letters, &c. relating to that separate trade.

The short result is therefore this. The Plaintiff, stating a partnership, formed upon certain terms, contained in a written correspondence, contends, that the meaning of the parties was, that no trade should be carried on with Russia except on the joint account ; alleging, that the Defendant did, in fraud of that agreement, and concealing the fact, carry on a separate trade, not only with Anderson and Co. but originally, contrary to the agreement, with other persons ; insisting, that this conduct of the Defendant was in both its branches a direct violation of the agreement ; giving the Plaintiff a right to a moiety of the profits. The course, taken by the Defendant, is not to demur or plead, but to state by answer, that, according \* to the true construction of the letters, contain- [\* 389] ing the terms of the agreement, he had full liberty to carry on this separate trade ; that afterwards, not choosing to rest upon that any longer, he carried it on with the leave of the Plaintiff ; and that is not a mere general assertion ; but it is made with reference to the letters. The Defendant says, that he will, though the Plaintiff is not entitled to the discovery, state that, the Defendant, having that license, did trade, at a considerable profit ; that he kept books and accounts ; referring to, and setting forth by a Schedule, the books, which he has ; yet by the same answer refusing to permit the Plaintiff to look at them.

As to the conclusion of fact, it is by no means clear, that the Defendant had any right to trade with other persons : but upon the letters, considered as an agreement, the far better opinion is, that he had no right to trade separately with Anderson and Co. If the answer had contained a clear, positive, unequivocal, averment of the Plaintiff's acquiescence and permission, the question, whether the Defendant was bound to make the discovery as to the fruit of it, would fairly arise : but the utmost amount of what appears is a special consent to send a small quantity ; which can never be represented as a general acquiescence in an unlimited trade, contrary to the general obligation.

The result is, that here is not averment positive enough of the ground, upon which the Defendant can refuse to answer ; that the manner, in which he states his objection, makes it impossible for the Court to decide, that he shall give no farther or other answer, according to the language of pleading ; and upon the whole, as he has put his defence upon the Record, he cannot refuse a production of the books, contained in the Schedule.

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SEE note 2 to *Jerrard v. Saunders*, 2 V. 187 ; the notes to *The Marquis of Donegal v. Stewart*, 3 V. 446 ; note 1 to *Bayley v. Adams*, 6 V. 586 ; and the note to *Jones v. Davis*, 16 V. 262.



## SEAMAN v. VAWDREY.

[ROLLS.—1810, FEB. 16, 19.]

RESERVATION of salt-works, mines, &c. in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation, upon the usual covenants, held an objection, giving a right to compensation; the purchaser not insisting upon it farther (a).

The inference of abandonment of a right from *non-user* not applicable to the case of mines, [p. 392.]

Whether under a mere reservation of Royal Mines, without a right of entry, the Crown can grant a license to enter on the land for the purpose of working them, *Quære*, [p. 393.]

THE Bill prayed the specific performance of a contract by the Defendant to purchase estates in the county of Chester. An objection was taken to the title upon the ground, that by indentures of lease and release, dated the 26th and 27th of September, 1704, Cicely Croxton conveyed to Peter Yate, his heirs and assigns, the manor and estate of Ravenscroft, subject to the following reservation: except and always reserved to the said Cicely Croxton and her heirs the Wych houses, salt works, and brine pits, in Ravenscroft, and a piece of land, adjoining thereto, parcel of the meadow, wherein the same salt works stood (describing it); and also all springs, veins, and mines, of brine salt or salt rock in another small parcel of the said meadow; with full liberty, without paying any thing, for Cicely Croxton and her heirs, &c. without the let, &c. of Yate, his heirs or assigns, to sink and make any new brine pits, salt pits, &c.; and to have free ingress, &c. to take, and carry away, and do all things necessary.

By the Conveyance of 1761 to John Seaman, under whose devise the Plaintiff was entitled, no notice was taken of the reservation in the deed of 1704.

The answer insisted, that under the said reservation there was in the heirs of Cicely Croxton a right to all the springs, mines, &c. in the land devised; and a right of entry, &c. in respect of which the Plaintiff is entitled to compensation. That question was therefore brought on, by consent, without an exception: the Defendant not making it an objection to the title.

[\* 391] Mr. *Richards*, and Mr. *Roupell*, for the Plaintiff, relied on the case of *Lyddall v. Weston*, (1); contending, that the salt works, existing upon this estate in the year 1704, having been levelled, and from that time no act by or under the title of Mrs. Croxton appearing, a strong presumption arose, that she had released, or, in some way abandoned her right under the reservation in that conveyance: especially as the title was taken in 1761 by a

(a) Courts of Equity will not compel a purchaser to take a doubtful title. See, *ante*, p. 272, note (a) *Stapylton v. Scott*.

(1) 2 Atk. 19.

purchaser, with the usual covenants, without the exception: showing a clear conviction at that time, that there was no right under that reservation.

Sir *Samuel Romilly* and Mr. *Wetherell*, for the Defendant.—The *non-user* of this right proves nothing: the object of such a reservation being, that the party may have the power of exercising the right, when his circumstances may enable him to meet the expense, attending such an undertaking. What time can bar such a private right? It is not like a right of way. The ground of presumption in all cases is, that the person, seeking to establish the right, has done some act inconsistent with it: but the possession in this instance was not inconsistent with the right claimed: as in the case of a right of way.

1810, Feb. 19th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt, that might be contained in the estate of Ravenscroft. It was for the purchaser to consider, how far it was prudent to take an estate, subject to such a lien; but in fact by the terms of the agreement Mrs. Croxton became as much the owner of the mines, as Mr. Yate became [\* 392] owner of the soil. The question is, how those, who may now represent her, have lost this property, or their right to enter upon the enjoyment of it. Not by any actual grant or release; for none is alleged: but it is said, at this distance of time a release is to be presumed. I do not clearly see any circumstances, from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment, to which he was entitled by the contract; and which is perfectly consistent with the right of the owner of the mines. If it could be shown, that he had wrought any mines himself, or had interrupted the other parties, claiming as representing Mrs. Croxton, under the reservation of the mines, in working them, that would lay a ground, upon which the presumption could stand: but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right; for I do not see, how the circumstance, that in the conveyance of 1761 no notice is taken of this reservation, can weigh against the persons, who represent Mrs. Croxton, if they should think proper to assert her right. There are many cases, where from *non-user* of a right the inference of abandonment may fairly be made: but that does not apply to such a case as this. It is not so generally true, that the owner of mines does work every mine, which he has a right to work: and therefore the relinquishment of the right, cannot be presumed from the non-exercise of it. It is well known, that mines remain unwrought for generations; that they are frequently purchased, or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought, until other mines shall be exhausted; which may not be for a long period of time. It is impossible therefore to infer, that this right is ex-

tinguished ; though there is no evidence of the exercise of it since the year 1704 (1).

[\* 393] \*The case of *Lyddall v. Weston* (2), instead of being an authority for the Defendant, appears to me to afford an argument by implication against him. The grounds upon which Lord Hardwicke's judgment goes, are two : first, that upon examination the probability was great, that there were no such mines : secondly, that the Crown, having merely reserved the mines, without any right of entry, could not grant a license to enter upon another man's estate for the purpose of working them. That position is liable to considerable doubt ; as being inconsistent with the resolutions of the Judges in the case of mines in Plowden (3). Lord Hardwicke however thought it necessary to assume it, before he could determine against the validity of the purchaser's objection. Here, first, it is not alleged, that there is no probability of mines upon this estate : it is rather admitted, that there were : secondly here is the reservation of a right of entry ; upon the want of which Lord Hardwicke laid stress in that case. The Defendant chooses to consider this, not as an objection to the title, but as a ground for compensation ; and I think, he is entitled to such compensation (4).

1 As to the respective rights of lord and tenant, to work old or new mines, see, *ante*, note 1 to *Grey v. The Duke of Northumberland*, 13 V. 236.

2. That a vendee who chooses to have a purchase-contract executed as far as that is practicable, with a compensation for deficiencies, is entitled to that equity, see note 6 to *Cooper v. Denne*, 1 V. 565.

## SHIRT v. WESTBY.

[1808, Nov. 8.]

CHARGE by Will on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at 4 per cent. (a).

JOHN HIRST by his Will, dated the 20th of June, 1795, directed, that all his just debts and funeral expenses be paid and discharged by his executor out of his personal estate ; and, in case [\* 394] that \*should prove deficient, he thereby charged and subjected his real estate to come in aid of and supply such deficiency. Then having charged his real estate with the payment of some annuities he gave and devised all his real estate to his eldest

(1) *Post*, vol. xix. 156, 9.

(2) 2 Atk. 19.

(3) Plowd. 310 ; see 336.

(4) *Calcraft v. Roebuck*, *ante*, vol. i. 221 ; and the note, 226.

(a) The testator is considered as adopting these debts as his own. 2 Williams, Exec. 1022.

son John Hirst, his heirs and assigns ; and also gave him all his personal estate ; and appointed him sole executor.

John Hirst the younger, having survived his father, by his Will, dated the 11th of October, 1802, directed the payment of his debts in the following manner :—

“ First, I will that all my just debts and funeral expenses be paid satisfied and discharged by my executrix hereinafter named out of my personal estate and in case that shall prove deficient I hereby charge and make subject my real estate to come in aid of and supply such deficiency.”

The testator then, charging his real estates in the county of York with the payment of some annuities, devised all his estates so charged, and all other his estates in the said county or elsewhere in Great Britain, to his sister Catherine Westby for life, with several remainders over to other persons in strict settlement, subject to a trust term for raising 6000*l.* ; which he disposed of by his Will ; and proceeded thus :—

“ And I do hereby charge and make subject and liable my real estates situate within the township of Kimberworth to and with the payment of the following sums of money or such of them as shall be unpaid and undischarged at the time of my decease and which are the debts of my late brother James Hirst deceased : to Sarah Jackson of Wath upon Lerne in the said county the sum of \* 300*l.*” ; specifying the other persons and sums in the same manner ; and he appointed his sister Catherine Westby his sole executrix. [\*395]

The testator died in the year 1804. The Bill was filed by creditors of John Hirst the elder, and of James Hirst, on behalf of themselves and all the other creditors ; and, the cause coming on for farther directions upon the Master's Report, under a Decree, directing the necessary accounts, the question was, whether the debts of James Hirst, remaining undischarged, at the decease of John Hirst the younger, which were ascertained by the Report at the sum of 1259*l.* 19*s.* 6*d.* should bear interest under the charge in his Will for payment of them. That question was expressly reserved by the Decree.

Sir *Samuel Romilly* and Mr. *Heald*, for the Plaintiffs, contended, that these debts, directed to be paid by a person, not under any obligation to pay them, were to be considered as legacies : and being charged upon a fund, producing an annual income, ought to carry interest.

Mr. *Richards*, Mr. *Alexander*, Mr. *Hall*, and Mr. *Heys* for the Defendants, insisted, that this is a mere question of intention ; whether the testator has made a voluntary gift ; or meant to put himself in the place of his brother ; merely doing an act of justice by paying his brother's debts ; as he, if living and solvent, would have done. A devise to pay the debt of another, cannot be considered as a legacy : a debt can carry interest only by the nature of the contract,

express or implied, or by the rule of the Court: and this claim fails upon either ground.

The cases cited were *Car v. The Countess of Burlington* (1); \* *Bothomly v. Lord Fairfax* (2); *Maxwell v. Wettenhall* (3); which cases, it was observed, are not now law: *The Earl of Bath v. The Earl of Bradford* (4). *Lloyd v. Williams* (5). *Shirley v. Earl Ferrers* (6). *Creuze v. Hunter* (7). *Aston v. Gregory* (8).

The Lord CHANCELLOR [ELDON] said, the question was, whether these particular sums are not to be considered as legacies, bequeathed by this testator; and as such to carry interest. He certainly did not regard them as *his* debts: nor did he mean, that interest should be paid before his death. It is clearly bounty: to be considered as a legacy, charged on real estate; and carrying interest; not as the debts of James Hirst; but as sums of money, bequeathed by John Hirst the younger. As they are charged upon real estate only, the interest must be computed from the death of the testator, at 4 per cent.

The Decree directed a reference to the Master to compute interest at the rate of 4 per cent. from the day of the death of the testator John Hirst the younger, upon the several sums, comprised in the Schedule to the Master's Report; being such of the debts of James Hirst, deceased, as were unpaid and undischarged at the decease of John Hirst the younger, and by his Will charged upon his real estates, &c.

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SEE note 4 to *Hutcheon v. Mannington*, 1 V. 366.

(1) 1 P. Will. 228. See, *ante*, vol. ii. 163, n.

(2) 1 P. Will. 334. It seems now settled, that upon any written contract for a sum of money, payable on demand, or upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment: *Lowndes v. Collins*, *post*, vol. xvii. 27. See, *ante*, i. 63, *Craven v. Tickell*, and the note; and for the distinction in bankruptcy, *Ex parte Koch*, 1 Ves. & Bea. 342; which distinction is done away by Stat. 6 Geo. IV. c. 16, s. 57.

(3) 2 P. Will. 26. See, *ante*, vol. ii. 163, n.

(4) 2 Ves. 363; 587.

(5) 2 Atk. 108.

(6) 1 Bro. C. C. 41.

(7) *Ante*, vol. ii. 157; 4 Bro. C. C. 157, 316.

(8) *Ante*, vol. vi. 151.

## BAKER v. HARRIS.

[1810, FEB. 20, 21.]

First and second mortgagees: the mortgagor a bankrupt.

The first mortgagee entitled to tack a subsequent Judgment, docketed, though no Execution had issued, at the time of the bankruptcy.

By indentures of lease and release, dated the 15th and 16th of September, 1791, John Sheppard conveyed the estates at Horton, in the county of Bucks, to Thomas Monday and his heirs, by way of mortgage for securing the sum of 2000*l.* and interest; the mortgagee also taking an assignment of an old term of five hundred years, created upon a former mortgage. In February, 1804, Sheppard, being indebted to John and William Baker in the sum of 2119*l.*, gave his bond, dated the 8th of February, to secure that sum; and, as a collateral security, by indentures of the same date, demised the same premises with some others to John and William Baker, their executors, &c. for the term of two thousand years, subject to the mortgage to Monday, subject to redemption, &c. In May, 1808, a Commission of Bankruptcy issued against Sheppard. William Baker being dead, John Baker, in his own right, and as administrator of William, filed the Bill against the devisees in trust of Monday, and against the bankrupt and his assignees; stating, that upon the Plaintiff's application to redeem the mortgage to Monday, the Defendants, his devisees, insisted, that they had a right to tack the sum of 500*l.* and interest, due upon a bond and warrant of attorney to confess judgment, given by the bankrupt on the 29th of July, 1793, upon which judgment had been entered up and duly docketed, in Michaelmas term, 1797, before the execution of the Plaintiff's mortgage; and praying a declaration, that the Defendants, the devisees in trust of Monday, are not entitled to tack the judgment to the mortgage; a redemption upon payment of what was due upon the \* mortgage alone; and against the as- [\* 398] signees a foreclosure, or a sale; and that the deficiency, if any, may be proved as a debt under the Commission. No execution had issued upon the judgment.

Sir *Samuel Romilly*, and Mr. *Edwards*, for the Plaintiff: Mr. *Wetherell*, for the Assignees under the Commission.

At the time of the bankruptcy no *Elegit* having been issued upon the judgment, which the Defendant, the first mortgagee, seeks to tack, that judgment clearly could not have been made available against the assignees: the Commission being itself an execution; and the consequence is, that it cannot avail against the second mortgagee; who has unquestionably a good lien upon the estate against the assignees. Under these circumstances, whatever claim the judgment creditor might have against assets, not having proceeded to make his judgment a perfect lien upon the land, he cannot now make it effectual. In bankruptcy a judgment without execution is

not considered as giving a lien against the general creditors ; though it might be so considered as against the debtor : the effect of the Commission being an execution for the benefit of all the creditors ; and the object of the bankrupt laws being an equal distribution among them ; admitting no priority. What distinction arises from the circumstance, that this creditor has an actual mortgage for another debt ? That can only rest on the doctrine of tacking ; which depends merely upon a principle of convenience ; to prevent the circuity of another suit. There is no instance, in which this has occurred in bankruptcy. This judgment must therefore stand upon the same footing as the other debts ; the statute preventing any priority.

[\* 399] Mr. *Martin* and Serjeant *Palmer*, for the Defendants, the Devises of Monday. — Though there is no authority precisely applicable to these circumstances, the known principles of this Court clearly authorize the right to tack this judgment against the claim of the Plaintiff under his mortgage, subsequent to that judgment docketed. The rule of Equity as between first and second mortgagees, the first having also a judgment, is perfectly settled in a case of *Brace v. The Duchess of Marlborough* (1). The fourth resolution (2), and the reason of it, apply precisely to this case ; that a first mortgagee, lending a farther sum to the mortgagor upon a Statute for judgment, shall retain, until both the mortgage and the statute, or judgment, be paid ; the presumption being, that he lent his money upon the statute or judgment, as knowing, that he had hold of the land by the mortgage ; and in confidence ventured a farther sum on a security, which though it passes no present interest, yet must be admitted to be a lien on the land. That doctrine was followed by Lord Hardwicke (3) ; and is completely settled. The subsequent mortgagee having no title in competition with the right to tack, can the bankruptcy have the effect of giving him a preference, which he could in no other way have obtained ? The first mortgagee has the legal estate, and also the fee. It is true, he did not pursue his judgment to execution : but what would have been the effect of it ? Execution was not necessary for the purpose of notice :

a judgment docketed being notice to all the world ; and  
 [\* 400] in a case (4), now depending, the \* Lord Chancellor has expressed an opinion, that, if there is a ground for the inference of actual notice, a judgment, though not docketed, would charge a purchaser. There was no motive therefore either of necessity or propriety, to take out execution. The assignees under the Commission of Bankruptcy cannot stand in a higher or more beneficial situation than purchasers for valuable consideration without notice : and if a person in that character had taken the equity of redemption, with an assurance, that the mortgage was the only

(1) 2 P. Will. 491.

(2) 2 P. Will. 494.

(3) *Shepherd v. Tilley*, 2 Atk. 348 ; *Jackson v. Langford*, 2 Ves. 662.

(4) *Davis v. Lord Strathmore*, *post*, 419.

charge, could he have been released from this additional lien upon the land? A debtor by a judgment, duly docketed, becoming bankrupt, the assignees take the land, charged with that lien. The argument from the general object of the bankrupt laws, an equal distribution among all creditors, applies with equal force to the mortgage itself; which is no more than a lien, a security for a debt, in the view of this Court. The argument from convenience applies to the case of a bond without judgment: the heir cannot redeem without paying the bond, on account of the circuitry; but that Equity does not prevail against a purchaser: *Archer v. Snatt* (1); and the reason is, that the bond creditor has no lien: but a creditor by judgment has been long considered in Equity as a mortgagee for this purpose.

Sir *Samuel Romilly*, in reply.—The only question is, whether the bankruptcy makes a difference. The Statute (2) is decisive; declaring, that a creditor, having security by judgment, &c. whereof there is no execution served and executed, upon any the lands, &c. shall not be relieved upon any such judgment, &c. With reference to the bankruptcy the case is certainly new; \* and [\* 401] the nature of a Judgment, in that view, was much considered by the Lord Chancellor in *Ex parte Knott* (3): a case certainly under very different circumstances.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—As this is said to be a question, that has never yet received a decision, it may be proper to give it some consideration: but I own, it appears to me to be very difficult to conceive, how a supervening bankruptcy can affect the right of the first mortgagee. The Statute relates to Judgments, that are properly and merely Judgments. The question will be, whether this has not ceased to be such, and become in contemplation of Equity blended and incorporated with the mortgage: so as to make in effect one entire mortgage, for one entire sum. Then it comes to this; that there are two mortgages before the bankruptcy; and both are equally available against the assignees.

Feb. 21. The MASTER OF THE ROLLS.—My opinion continues clearly, what I yesterday intimated it to be; that the subsequent bankruptcy cannot in any degree affect the mortgagee; who before the bankruptcy has a complete lien upon the land as well for the Judgment as the mortgage debt. The Statute relates only to Judgments, that continue merely such at the time of the bankruptcy: not to those, which have acquired all the effect of an actual mortgage; as is the case of a Judgment, obtained by a party, having an antecedent mortgage.

SEE the note to *Jolland v. Stainbridge*, 3 V. 478; and note 2 to *Ex parte Knott*, 11 V. 609.

(1) 2 Str. 1107.

(2) Stat. 21 Jam. I. c. 19, s. 9; see Stat. 6 Geo. IV. c. 16, s. 108.

(3) *Ante*, vol. xi. 609; see 619, 620.



## HILL v. BARCLAY.

[1810, MARCH 1, 2.]

As to relief against an Ejectment by a landlord for breach of a covenant to repair,  
*Quære (a).*  
 Relief against a right of entry on breach of covenant by non-payment of rent,  
 [p. 405.]  
 No specific performance of a covenant to repair (b), [p. 405.]

THE Plaintiff was tenant for years under the Defendant ; with covenants to lay out 150*l.*, within a given time : to keep the premises in repair : to leave them in repair at the end of the term ; that it should be lawful for the Defendant twice in the year to enter, and survey the premises ; and to require the necessary repairs to be done within three calendar months ; and a right of entry was reserved upon breach of any of the covenants.

An Ejectment being brought by the landlord, assigning various breaches of the covenant to repair, a motion was made for an Injunction.

Sir *Arthur Piggot*, Mr. *Richards*, and Mr. *William Agar*, in support of the Motion. Sir *Samuel Romilly* and Mr. *Wingfield*, for the Defendant.—The late case of *Sanders v. Pope* (1), and the cases there referred to, were cited : the Counsel for the Defendant insisting upon the distinction, appearing to have been taken in *Wadman v. Calcraft* (2) ; which case, it was contended for the Plaintiff, does not, at least by the decision, affect this question ; the relief being confined to the breach of covenant by non-payment of rent : the Statute (3) on the same account being equally inapplicable.

[\* 403] \* The Lord CHANCELLOR [ELDON].—With regard to the case, decided by Lord Erskine, upon a covenant to lay out 200*l.* in repairs within a given time, it would not become me at present to say more than that I am inclined to think, considerable arguments may be urged against the relief, given in that instance. The Judgment, delivered by Lord Erskine, which is the more valuable, as he comments upon all the cases, that were cited, goes a length, (extra-judicial certainly, the circumstances not calling for it) ; which would reach this case : a general covenant to repair. As to the case of *Wadman v. Calcraft*, the particular circumstances did not require me,

(a) The doctrine seems now established in England, that, in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted, in Equity, unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation. 2 Story, Eq. Jur. § 1323. For the cases and illustrations of this doctrine, see, *ante*, note (a) *Eaton v. Lyon*, 3 V. 690 ; note (a) *Sanders v. Pope*, 12 V. 282.

(b) It seems to be completely settled that there is no jurisdiction to compel repairs. 2 Story, Eq. Jur. § 727. See, *ante*, note (a) *Mosely v. Virgin*, 3 V. 184 ; note (a) *Flint v. Brandon*, 8 V. 164.

(1) *Ante*, *Sanders v. Pope*, vol. xii. 282. See the notes, x. 70 ; iii. 693.

(2) *Ante*, vol. x. 67.

(3) Stat. 4 Geo. II. c. 28, s. 2.

or the Master of the Rolls; to state the opinion, that we did state in substance, though shortly, upon the doctrine, which must be applied to the case now before me: that a Court of Equity would not relieve against a breach of a general covenant to do repairs: the relief being sought upon no other ground than an ejectment, brought upon the clause as to non-payment of rent.

As to the circumstances of this case, besides the general covenant to keep the premises in repair, and to leave them in repair at the end of the term, the landlord under the other distinct covenant had a right to enter upon any two days of the year he thought fit, whether the worst or the best time for doing repairs; to require the necessary repairs to be done within three calendar months; with a right of entry upon breach of either of those distinct covenants: the one, to repair, generally: the other, according to requisition. That requisition might have been made in February 1809; when the tenant was living: but the landlord was under no obligation to make it; as, without taking that remedy, he \*might [\* 404] have maintained an ejectment; assigning, as a breach, the fact, that the premises were out of repair. The particular delivered has no reference to a breach of the covenant to repair according to requisition upon entry; but goes upon the general want of repair; not advertg to that particular covenant; and the principle, upon which the motion is made, admits, that the landlord can recover at Law.

The first difficulty upon the cases decided is, that, the Plaintiff proposing to give Judgment at Law, without giving me more information, I shall not know, when the application may be made hereafter to stay execution, whether the recovery was for not mending a window, or for the utter ruin of the premises; if all the breaches, stated in the particular, should be proved. There is no ground for relieving a tenant, whose conduct with reference to his covenant has been gross and ruinous, that the landlord may be placed in the same situation by afterwards putting the premises in sufficient repair. How can it be ascertained, that the subsequent repairs do put the landlord in the same state? That sort of speculation therefore has never been considered as affording a ground for relief. The object of such a covenant is, that the landlord shall have that species of security, which is the result of keeping the premises from time to time in that state, which the covenant requires. Before I interfere therefore to stay the execution, I must have an admission of the state of the property; which forms the right of the landlord under this instrument to recover the possession of the premises.

The next consideration is, what is to be done, supposing I knew the facts; disposing of this upon a mere motion; and finding this case of *Sanders v. Pope*; and \*I confess, I entertain great doubt upon the subject. See how it stood before that decision. The Statute (1) determines no case except that of

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(1) Stat. 4 Geo. II. c. 28, s. 2.

rent; upon which relief is given at law, as well as in equity; and the Statute expressly excludes any farther relief in Equity. The relief in that case of rent is given perhaps upon too loose a ground: viz. payment with interest; which by no means puts the party in exactly the same situation, as if the rent had been paid at the time stipulated: that doctrine of a Court of Equity being contradicted by general experience. The situation of the landlord is however very different as to rent and as to these other covenants. He may bring an ejectment upon non-payment of rent: but he may also compel the tenant to pay the rent. He cannot have that specific relief with regard to repairs. He may bring an action for damages: but there is a wide distinction between damages and the actual expenditure upon repairs, specifically done. Even after damages recovered the landlord cannot compel the tenant to repair: but may bring another action. The tenant therefore, standing those actions, may keep the premises until the last year of the term: and from the reasoning of one of the cases (1) the conclusion is, that the most beneficial course for the landlord would be, that the tenant, refraining from doing the repairs until the last year of the term, should then be compelled to do them.

The difficulty upon this doctrine of a Court of Equity is, that there is no mutuality in it. The tenant cannot be compelled to repair. This Court, according to Lord Thurlow's opinion, [\* 406] would not entertain a Bill for that \*purpose (2); and is the tenant to have the option, against the will of the landlord, of keeping the lease upon those terms; from time to time breaking the covenant, which he cannot be compelled to perform; and avowing, that he will not fulfil his obligations? Even with regard to a covenant to lay out a sum of money within five years, how can I estimate, whether, if laid out in the sixth year, that will be equally beneficial to the landlord? As to the old cases, it is very difficult to know what to do with them: In *Webber v. Smith* (3) both Reports represent the relief to be upon undertaking to do the repairs. How the relief was actually to be given, what became of it, we are not informed. Probably nothing more was done. This is a very dangerous jurisdiction. Very little information upon it is to be collected from ancient cases; and scarcely any in modern times. At least, I must, before I stay the execution, know the fact, what was the state of these premises, and their want of repair, when the ejectment was brought. Taking it, that all these breaches of covenant assigned were proved, there is no ground for relief. If, the premises having been suffered to fall much out of repair, and the landlord making the requisition to repair, the tenant refused to

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(1) *Hack v. Leonard*, 9 Mod. 91.

(2) See *Mosely v. Virgin*, ante, vol. iii. 184, and the references.

(3) 2 Vern. 103; 1 Eq. Ca. Ab. 115, pl. 14.

comply, I cannot perceive any pretence for applying to a Court of Equity (1).

1. With respect to forfeiture of leases by breaches of covenant; and the cases in which equity will relieve against such forfeiture; see, *ante*, the notes to *Williams v. Cheney*, 3 V. 59; note 2 to *Eaton v. Lyon*, 3 V. 690; and the note to *Barret v. Blagrave*, 5 V. 555. That mutuality of rights and remedies between contracting parties, is of the very essence of justice, see note 2 to *Gibbons v. Caunt*, 4 V. 840: and for a qualification of the *dicta*, occasionally met with, that a court of equity will in no case superintend, by means of its officers, the execution of a contract to rebuild or repair, see note 2 to *Lucas v. Comerford*, 1 V. 235.

2. The decision so strongly censured in the principal case, was not *Brown v. Quiller*, Amb. 619; but *Stack v. Leonard*, 9 Mod. 91: see *Reynolds v. Pitt*, 19 Ves. 141.

## CORBETT v. CORBETT.

[\* 407]

[1810, MARCH 3, 5.]

IMPROPER and vexatious conduct in a former Suit, or a subscription, though liable to be impeached as maintenance, no ground for dispaupering (a).

Practice at Law as to suing in *forma Pauperis*.

Pauper not proceeding to Trial, after giving notice, dispaupered, or not permitted to proceed, [p. 408.]

Whether proceedings would be stayed in an Action by a Pauper until payment of costs of a Non-suit in a former Action for the same Cause, as a Pauper or not, *Quare*, [p. 410.]

A MOTION was made by the Defendant, that the Plaintiff may be dispaupered. The Plaintiff claimed as heir at law; impeaching the devise, under which the Defendant was in possession, as having been improperly obtained. A former Bill for the same purpose, in which also the Plaintiff sued as a pauper, was dismissed some years ago without costs, but not upon hearing; though the cause had reached that stage.

The affidavits in support of the Motion alleged, that the Plaintiff was supported in maintaining this litigation by a subscription; and contained charges of improper and vexatious conduct.

Mr. Richards and Mr. Benyon, in support of the Motion. Sir Samuel Romilly and Mr. Bell, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—Before I come to a decision upon this Motion, I wish to look into the cases and books of practice, both in this Court and at Law. The course at law is thus represented by Mr. Tidd (2):

“It has been said, that, if a pauper be nonsuited, he shall pay

(1) *Post*, vol. xviii. 56.

(a) As to proceedings and costs in *forma pauperis*, see, *ante*, note (b) *Whitlock v. Baker*, 13 V. 511.

As to the doctrines of Champerty and Maintenance, see, *ante*, note (a) *Wallis v. Portland*, 3 V. 494.

(2) 1 Tidd's Prac. 73.

costs, or be whipped: but this punishment does not appear to have been ever inflicted. If the pauper gives notice of trial, and do not proceed, or be otherwise guilty of improper conduct, the [\* 408] Court \*will order him to be dispaupered: but, until this be done, they will not make any rule about costs; and, unless the pauper's conduct appear to be vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one for the same cause: nor will they deduct the costs of the first out of those received in the second." •

The consideration is very different, whether a Plaintiff is to be dispaupered in a second suit; and whether the proceedings shall be stayed, until he pays the costs, incurred in the former suit. Where a pauper, having given notice of trial, does not proceed to try his cause, he is, I believe, either dispaupered, or not permitted to proceed: yet that in many instances may produce great hardship; as he may not be able to find the means of putting his brief into the hands of Counsel. Whatever may be the inconvenience, arising from the conduct of this Plaintiff, if it does not amount to that degree of vexation, which would authorize the Court to say, he should not institute another suit as a pauper, I cannot dispauper him. I do not know, how far in such a case the Court has looked at the merits beyond the close of the first suit: if there is no determination upon it, I should be inclined to consider it rather dangerous in the case of a pauper to do, what could not be done in the case of another person: to regard, as grounds of complaint for the purpose of dispaupering, circumstances of conduct in the former cause; which were not offered to the Court in that cause by those, who had reason to complain of them; and, much as I approve the tenderness and liberality of not calling for the costs, if they could have been [\* 409] called for in the former cause (1), \*I cannot look at it as a circumstance to proceed upon for this purpose.

*March 5th.* The Lord CHANCELLOR [ELDON].—I take the state of facts to be capable of this representation. A Bill, filed some years ago by the Plaintiff in this suit, who was then admitted to sue *in forma Pauperis*, having gone through all the stages, answer, replication, examination of witnesses, publication passed, until the cause was set down for a hearing, was dismissed, in consequence of a benevolent feeling in the Defendants, without costs; and the Bill in this suit is now filed after lapse of several years by the same person, again admitted to sue *in forma Pauperis* against the same Defendants.

I have looked into all the books of practice, and the Reports, both in Law and Equity, upon this subject; and upon the best consideration I am persuaded, that, if the Defendant had thought otherwise than he did upon that, he might have had that Bill dismissed with

(1) A pauper cannot dismiss his Bill without costs. *Pearson v. Belsher*, 3 Bro. C. C. 87.

costs. I do not enter into the consideration, how far the Plaintiff has a rational prospect of success in this suit ; whether a termination favorable to him, can be consistent with general safety ; and in what degree, if such a suit can be maintained, the rules of this Court as to evidence and publication are broken down. As it is clear, that the termination of the former suit cannot be pleaded in bar, it is unnecessary to consider those topics. The single question is, whether, having regard to the circumstance, that the former Bill was dismissed without costs, that another suit is instituted by the same Plaintiff, who has \*been again admitted to sue as a *pauper*, [\*410] to what is contained in these affidavits as to his conduct before the institution of this suit, and as to the money, collected by subscription, apparently for the maintenance of this suit, I can dispauper him.

I have observed, that it is material to attend to the cases at Law. This jurisdiction for the relief of paupers originating in a Statute, those decisions ought to be attended to : as giving the doctrine, and supplying reasons by analogy. I find cases, in some degree applying to this ; but none, in which the Plaintiff in a second action has ever been dispaupered on account of what had passed in the former suit. There are instances, where after a judgment of nonsuit against a pauper, and another action by him for the same cause, the Court have intimated, that probably they would interpose to stay proceedings in the second cause, until the costs of the former action were paid (1) ; but never, that on account of what passed in the former cause the party should be dispaupered in the second. There is a stronger case : where the Plaintiff, not suing as a pauper, had judgment of nonsuit ; and the costs were taxed at 32*l*. He afterwards brought another action : in which he was admitted as a pauper ; and an application was made to the Court ; which, though successful, appears to me to admit considerable doubt ; that the Court would stay the proceedings in the second cause, in which the Plaintiff was admitted to sue as a pauper ; as he had not paid the taxed costs of the former action. The Court did stay the proceedings ; until the Plaintiff by some means procured that sum of 32*l*. ; intimating thereby, that, as he had in that former action stood as any other suitor, he should not by becoming a pauper evade the payment of those costs : but, if by operating upon the feelings of friends he could procure that sum, which upon his affidavit the Court could not conceive him to be \*possessed of himself, they would permit him to pro- [\*411] ceed ; but not until he had paid those costs (2).

These however are cases, in which there was a demand for costs under the first judgment against the Plaintiff. In this instance, the Bill having been dismissed without costs, there was no judgment, or suit, in which there was any demand for costs against this Plaintiff. The answer to an application of that sort would have been, that the

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(1) 2 Ves. & Bea. 112.

(2) Mos. 68.

Defendant permitted the cause to go out of Court without constituting any demand for costs against the Plaintiff. I cannot therefore stay the proceedings on that ground, with reference to a cause, in which there was no demand for costs. Then, with regard to the allegations of conduct, highly as I disapprove the circumstances, contained in these affidavits, I cannot see my way to act upon that disapprobation, as this Motion proposes. With regard to the object of this Motion there is no distinction, whether it is, the first or second cause. The party applying as a pauper, the Court inquires no farther than whether he has established by affidavit, that he is a pauper; and has obtained that pledge, in giving which the duty of Counsel and the Court to the suitors requires, that it should not from motives of feeling be too easily given. There is no instance, that the conduct of a Plaintiff, before he was Plaintiff in that cause, for which reason that conduct cannot amount to a contempt, has been considered a sufficient ground against his privilege of suing as a pauper.

Then, upon the head of vexation, I am not aware, that any has been done farther than staying proceedings upon the head of vexation, not in that cause. Upon vexation in the cause they [\*412] have gone farther; as, where \* a pauper had given six notices of trial, he was dispaupered; in order to give costs against him; but for vexatious conduct in a former cause there is no step, which consistently with precedent could be taken against a pauper, except staying the proceedings, until the costs, due in that former cause, should be paid. That however does not apply to this case: no costs being due in the former suit. With regard to the other circumstances, I cannot persuade myself, that the supply by a charitable hand of that money, which a pauper may want for the purpose of carrying on the cause, in which he is to pay no such costs as other parties pay, can be an available objection upon this head; that he is in other circumstances than those, in which he would be entitled to sue as a pauper: if it might be impeached as maintenance; a proceeding, which the Law will not endure.

I cannot therefore grant this Motion: but I will not give any Costs upon it (1).

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SEE *ante*, the note to *Ex parte Shaw*, 2 V. 40, the note to *Spencer v. Bryant*, 11 V. 49, and the note to *Rattray v. George*, 16 V. 232, for a summary of some of the leading rules with respect to suits *in forma pauperis*: and as to the doctrines of maintenance and champerty, see the note to *Wallis v. The Duke of Portland*, 3 V. 494; and note 1 to *Stevens v. Bagwell*, 15 V. 139.

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(1) *Bowyer v. M'Evoy*, 1 Ball & Bea. 562; Beames on Costs, 112, &c.

## CASTLE'S CASE.

(IN THE BANKRUPTCY OF HOLMES.)

[1810, MARCH 5.]

A SOLICITOR, arrested on his way from his residence to Lincoln's Inn Hall, without deviation, for the purpose of attending a Bankrupt Petition, as Solicitor, discharged on personal examination by the Lord Chancellor: the oath administered by the Register: but to be entitled in the Bankruptcy.

MR. JOHNSON applied to the Lord Chancellor on behalf of a Solicitor; representing, that he was arrested on his way to Lincoln's Inn Hall for the purpose of attending as Solicitor a Petition in Bankruptcy. The \*party and the officer being ordered [\*413] to attend, the former was sworn; and examined by the Lord Chancellor: the oath being administered by the Register, who was sitting at the time. The party stated, that he was arrested three steps from his own door about twenty minutes before ten o'clock that morning; that he left his house with the purpose only of going to Lincoln's Inn Hall, to attend a Bankrupt Petition, standing second on the Paper; that he went by the most direct way; and had not deviated in the least. The Officer admitted the statement as to the place and time of the arrest.

The Lord CHANCELLOR [ELDON] ordered, that the party should be discharged; and assented to the suggestion of the Register, that the Application must be entitled in the Bankruptcy.

*Gascoyne's Case* (1) was referred to.

SEE the note to *Gascoyne's case*, 14 V. 183, with the farther references there given.

## WALL v. TOMLINSON.

[ROLLS.—1810, MARCH 5, 6.]

RESIDUARY bequest to A. "in case she should have legitimate children; in failure of which" to go over.

A. having only one child born alive, who died before her, entitled absolutely.

Stock, the property of a married woman, not reduced into possession, so as to be vested in her husband, by a transfer to him merely as a trustee (a).

PHILIP DELAFIELD by his Will, after giving some legacies, and some specific legacies to Lord Say and Sele, to his son Thomas Twisleton all his effects \*in India, annuities of 20*l.* [\*414] for life to his niece Mary Delafield and his sister Jane Broad, and to Harriet Wittle Strangeway a like annuity of 20*l.* for life, gave

(1) *Ante*, vol. xiv. 183; see the note, iii. 351.

(a) The husband's receipt or possession of his wife's choses in action must be in



the interest of the residue of his property to his wife Mary Delafield for life; and after her death he gave the principal of his property to her children, if she had any by him: but if she had no children then to the said Harriet Wittle Strangeway for ever in case she should have legitimate children: in failure of which the whole in Lord Say and Sele's daughters Julia and Cassandra Twisleton; and he directed that part of his fortune, which was then in England, to remain where it then was in the funds till Mrs. Delafield's death.

The testator died in 1783. His widow, who was the surviving executrix, died in 1802; never having had any children. Harriet Wittle Strangeway married William Cowles; and after their deaths the Bill was filed by the executors of William Cowles and the administrators with the Will annexed of his widow; claiming the residue.

The Master's Report stated, that Mr. and Mrs. Cowles were married in March 1802; that Mrs. Cowles was delivered of a still-born child in April 1803; in March 1804 she had a male child; who died in April 1805; and was the only child of the marriage born alive. William Cowles died in March 1804; and his widow died in 1805, after the death of the child.

The Defendants, the daughters of Lord Say and Sele, with their husbands, claimed under the limitation over.

The Report farther stated, that after the death of the testator's widow administration *de bonis non*, with the Will annexed, was granted to Mrs. Cowles; of the personal estate of the testator; [\* 415] and a similar administration \*to his widow, as to 1000*l*.

East India Stock, of which she had after his death obtained a transfer, was also granted to Mrs. Cowles; and it was agreed, that William Cowles should have a transfer of part of the testator's property, consisting of Short Annuities, of the value of 1500*l*., to himself; and that the East India Stock, of the value of 2000*l*., should be transferred to trustees, in trust, first, for payment of the annuities, and, subject thereto, for the separate use of Mrs. Cowles, and in the event of her husband's surviving her to pay the dividends to him for life, and after the death of the survivor to divide the principal among the children according to the appointment of Mrs. Cowles; in default of appointment equally; and, if there should be no children, to the survivor of the husband and wife absolutely; and it was farther agreed, that the Stock should be transferred into the joint names of William Cowles, the husband, and the Defendant Tomlinson, until trustees should be named; and the Stock was transferred accordingly: but the agreement was never reduced to writing.

The questions were, first, upon the claim of Mrs. Leigh and Mrs. Graves, the daughters of Lord Say and Sele, under the limitation over: secondly, between the Plaintiffs, as executors of William

the character of husband, in order to defeat his wife's title by survivorship. 1 Williams, Exec. 616; Clancy, Rights of Women, (Am. ed.) 139, 140.

As to reduction to possession of his wife's *choses in action*, and her right by survivorship in certain cases, 2 Kent, (5th ed.) 135; *ante*, note (a) *Blount v. Bestland*, 5 V. 515; note (a) *Scauen v. Blunt*, 7 V. 294, 300.

Cowles, claiming the East India Stock, as having been reduced into possession by the transfer to him with Tomlinson, and legatees of his widow, claiming under the last limitation of the trust, upon which that transfer was made; as she had survived her husband.

Mr. *Leach* and Mr. *Owen*, for the Plaintiffs. Sir *Samuel Romilly*, Mr. *Heys*, Mr. *Martin*, and Mr. *Wetherell*, for the Defendants.

\* *March 6th.* The MASTER OF THE ROLLS [Sir WIL- [\*416] LIAM GRANT].—The testator's object appears to have been in the event of Mrs. Cowles having children to give her the means of making a provision for them. It cannot be contended, that from the event of her having only one child there is to be a different construction; so that in that case the child was to be left without a provision. As to the words "in failure of which" it is very difficult in this case to give those words the construction of not leaving children at her death; which would tie it up during her whole life. The testator does not seem to have contemplated the event, which has happened, of the death of the children in the life-time of the mother.

Upon the other question the transfer of the East India Stock to the husband, merely as a trustee, cannot be represented as a reduction into possession, that will entitle his representatives. It was made *diverso Intuitu*.

1. A REQUEST of personal property, in case the legatee should have legitimate children, is a gift which, if uncontrolled by the context of the testator's will, would, of course, vest absolutely, as soon as that condition was fulfilled: if any intended qualification of the absolute interest can be clearly collected from other passages of the will, that intention may take effect; but an express disposition in one part of a will must not receive an exposition from another passage, affording only a conjectural inference: see, *ante*, note 4 to *Blake v. Bunbury*, 1 V. 194.

2. A merely fiduciary possession of his wife's property by a husband can never be considered such a reduction into possession as will entitle his representatives, and exclude the right of the surviving wife: *Baker v. Hall*, 12 Ves. 501.

### DUCKWORTH, *Ex parte*.

[1810, MARCH 6.]

COMMISSION of Bankruptcy may be superseded at any time after the first Meeting upon consent of all the creditors, who had proved.

THE object of this Petition was to supersede a Commission of Bankruptcy upon the consent of all the creditors, who had proved their debts. That consent was produced to the Commissioners, when only the first meeting had taken place; at which, besides the petitioning creditor, only two creditors had proved. The Commissioners refused to certify.

Mr. *Wingfield*, in support of the Petition.

Mr. *Montague*, who was one of the Commissioners, stated the ground, upon which the Commissioners refused to certify; that distant creditors, intending to prove their debts at the second or third meetings, might be surprised.

The Lord CHANCELLOR [ELDON].—The practice has been to supersede the Commission upon the consent of all the creditors, who had proved, when the application was made.

The objection of the Commissioners has a very rational foundation; and has often occurred to me; a Commission of Bankruptcy being a proceeding for the benefit, not only of the creditor, who takes it out, but of all creditors, who may choose to take advantage of it. The practice has however been uniform against this objection.

The Order was made accordingly (1).

SEE notes 1, 2, to *Ex parte Stokes*, 7 V. 405.

## WATERS v. TAYLOR.

[1810, MARCH 9.]

AFTER Process to a Serjeant at Arms issued, but not executed, Answer, and Exceptions submitted to by a note between the Clerks in Court; but, no farther Answer being put in, the Serjeant at Arms ordered to go.

Defendant, taken upon the process for want of an Answer, is on putting in an Answer entitled to be discharged, without waiting for the Report, that it is sufficient.

AFTER Process to a Serjeant at Arms had gone against the Defendant, but before it was executed, an Answer was put in; [\*418] and Exceptions taken; upon which \*a note was handed over from the Defendant's Clerk in Court to the Plaintiff's that the Defendant submitted to answer the Exceptions; but no farther Answer being put in, a Motion was made, that the old process, which still remained with the Serjeant at Arms, might go against the Defendant for want of an Answer.

Mr. *Johnson*, in support of the Motion, cited *Child v. Brabson* (2).

(1) This practice is corrected by a General Order, 2 Cooke's Bank. Law, 8th edit. 278, that in future no Commission shall be superseded on consent of all the creditors, who shall have proved, until after the second meeting; and that on the Commissioners being satisfied at the second meeting, that a Petition will be presented for superseding the Commission with the consent of all the creditors, who shall have proved debts, the Commissioners shall adjourn the choice of assignees, to give the opportunity of presenting such Petition.

(2) 2 Ves. 110.

The Lord CHANCELLOR (1) [ELDON].—I have had occasion to consider this point; and I conceive, that, if the Defendant is taken upon the process for want of an Answer, he is not to be kept in custody, while the examination, whether the Answer is sufficient or insufficient, is proceeding (2); as, if it should prove sufficient, he would have been in custody without reason; and though the consequence, if on the other hand the Answer should be insufficient, is also mischievous, the degree of mischief is not so considerable. The difficulty in this case as to taking up the former process is, that this Defendant was not taken upon any process, before he put in his Answer. This is not therefore the case of a caption without any Answer put in. I find no instance, in which under these circumstances the old process was used; and a strong opinion prevails, that the Plaintiff ought to begin again. Yet notwithstanding that opinion, and though there is no instance known, I am inclined to think, it will do on principle.

\* An Order was afterwards made; stating the former [\* 419] Order, that, the Defendant being in contempt for want of his Answer to the Bill, the Serjeant at Arms should apprehend the Defendant, and bring him to the Bar of the Court to answer his said contempt; whereupon such farther Order should be made as should be just; that, before the Serjeant at Arms took the Defendant into his custody, he put in his Answer to the Plaintiff's Bill; to which the Plaintiff, being advised, that it was insufficient, took exceptions; and the Defendant upon the 11th of January, 1810, submitted to answer the said exceptions: but he hath not since put in a farther Answer; as by the Six-Clerk's Certificate, dated this day, appears; it is thereupon ordered, that the Serjeant at Arms, attending this Court, do apprehend the said Defendant, pursuant to the said Order; and bring him to the Bar of this Court to answer his said contempt; whereupon such farther Order shall be made as shall be just (3).

THE rule laid down in the principal case (and in many previous ones; see *Bailey v. Bailey*, 11 Ves. 151, and the note to that case, *ante*, p. 251,) that a defendant who, after being taken on process for want of an answer, puts in an answer, is not to be kept in custody while an examination whether such answer be sufficient or insufficient is pending, has been confirmed by the later cases of *Bonus v. Flack*, 18 Ves. 287; *Boehm v. De Tastet*, 1 Ves. and Beat. 327; and *Balfour v. Farquharson*, 1 Sim. & Stu. 72, S. C., Turn. 87. As to a proposed new regulation when a defendant has put in a third insufficient answer, see the note to the *Anonymous case*, 2 V. 270.

(1) The Lord Chancellor's observations are taken from a short-hand writer's notes.

(2) *Bailey v. Bailey*, *ante*, vol. xi. 151; see the note, 152.

(3) *Weston v. Jay*, 1 Madd. 527.

## DAVIS v. THE EARL OF STRATHMORE.

[1810, FEB. 5, 6, 8; MARCH 12.]

PURCHASER bound by Notice of a Judgment, though not docketed (a).

Purchaser within the Registry Act (7 Ann. c. 20) bound by notice of a deed, not registered, [p. 427.]

Distinction between Acts of Parliament, denying legal effect to instruments, as the Act for enrolling bargains and sales, and the Registry Act (7 Ann. c. 20), and Acts declaring instruments void to all intents; as the Annuity and the Ship Registry Acts. Notwithstanding the former the party is bound in equity by the contract (b), [p. 428.]

THE Bill stated, that William Davis, being seised in fee of estates in the county of Durham, by articles, dated the 8th of May, 1806, agreed to sell to the Defendant in consideration of 16,375*l.*; that, the abstract having been delivered, the Defendant is satisfied with the title; except in respect of a Judgment in the Court of King's Bench, which is subsisting against the said William Davis, as of Trinity Term, 39 Geo. III. at the suit of Samuel Batchelor; for 600*l.* and 63*s.* damages and costs; and the Defendant insists, that, he \*having notice of the said Judgment, the Plaintiff's title is not such as a purchaser can safely take; so long as the said Judgment remains unsatisfied; and the Plaintiff ought to complete the said Judgment, and cause satisfaction to be entered on record, before the Defendant can safely accept the title.

The bill farther stated, that in fact Batchelor only caused the said Judgment to be signed; that there is no entry of it on the Roll; and that it has never been docketed or entered, as by the Statute (1) is required, or otherwise, as hereafter mentioned; and all, that appears, relating to the said Judgment, is an entry in the Book, kept by the Clerk of the Judgments in the Court of King's Bench; who also exercises the office of Clerk of the Dockets, for inserting in alphabetical order by the Defendant's names all Judgments at the respective times of signing the same, or as soon afterwards as conveniently may be; and whether the same be completed by entry thereof upon the Roll, or not; insisting that the said judgment, not having been entered on the Roll and docketed, is not by Law any lien upon the Plaintiff's real estate; and that the Defendant's having notice of the Judgment does not afford any just reason, why the estate should be liable to it.

(a) A person, who is not a party to a decree, if he has actual notice of it, will be bound by it. 1 Story, Eq. Jur. § 407. As to notice by means of Registration and otherwise, see, *ante*, note (a) *Jolland v. Stainbridge*, 3 V. 478.

(b) The remedial power of Courts of Equity does not extend to the supplying of any circumstance, for the want of which the legislature has declared the instrument void; for, otherwise Equity would, in effect, defeat the very policy of the legislative enactment. 1 Story, Eq. Jur. § 177.

(1) Stat. 4 and 5 Will. & Mar. c. 20, s. 3, made perpetual by Stat. 7 and 8 Will. & Mar. c. 36, s. 3.

The Bill therefore prayed a specific performance ; and the Defendant demurred.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Toller* in support of the Demurrer. — The question upon this demurrer is, whether the Act of Parliament (1) was intended to affect the established law of \* Courts of Equity ; and to alter what had previously been the settled doctrine upon the effect of notice. [\* 421]

By analogy to the decisions upon the Registry Act (2) the Court must in this case hold, that the land will be affected in the hands of a purchaser with notice. That Act of Parliament certainly was not intended to interfere with the decisions of Courts of Equity upon this subject. The object was to correct the mischievous consequences of a practice, which had become frequent : a purchaser permitting the vendor to keep the title-deeds ; leaving it in his power to offer the estate again to sale : a conduct open to impeachment either for fraud or negligence upon which Courts of Equity gave relief indirectly ; not interposing against a party, who could recover in ejectment : but, refusing to assist him ; if under such circumstances he was obliged to have recourse to a Court of Equity ; according to your Lordship's decision in *Wallwin v. Lee* (3). The evil, recited by this act, to heirs, executors, and administrators, and also to purchasers and mortgagees, by judgment, entered upon Record, &c. by reason of the difficulty there is in finding out such judgments, is not applicable to the case of notice. Before that Act a purchaser, with notice of an agreement to give a lien by judgment, would have been bound to give effect to that agreement. A judgment may be tacked against a second mortgagee (4). The creditor, having advanced his money, has instituted a proceeding, by which he can make the real estate available. He has that advantage, not by contract, but from the circumstance, that, having various remedies, he rests upon his judgment ; which he can enforce against a moiety of the land at any time ; and which upon the death of the debtor gives a right to payment out of the real assets. The distinction is not \* material, whether by contract, or by law, [\* 422] the creditor acquires an interest, which gives a lien upon the land ; enabling him in this Court to redeem a prior mortgage, and to tack his judgment against a subsequent mortgage. The case of *Thomas v. Pledwell* (5) is a direct authority, by Lord Macclesfield, upon this question ; that a purchaser is bound by notice of a judgment, though not docketed.

Mr. *Hart* and Mr. *Cooke*, for the Plaintiff. — Under this Act of Parliament nothing can be considered as notice to the extent of binding the land at law, except a judgment, docketed according to

(1) Stat. 4 and 5 Will. & Mar. c. 20, s. 3, made perpetual by Stat. 7 and 8 Will. & Mar. c. 36, s. 3.

(2) Stat. 7 Ann. c. 20.

(3) *Ante*, vol. ix. 24.

(4) *Jackson v. Langford*, 2 Ves. 662.

(5) 7 Vin. Abr. 53, pl. 5 ; 2 Eq. Ca. Ab. 599, pl. 25.

the Statute ; which declares expressly, that, not only the names of the parties, but also the number of the roll, shall be stated : to that extent repealing the Statute (1), which gives the creditor a remedy against the land, as to a moiety. After that Statute judgments bound the land from the first day of the term, in which they were entered. The principle and object of the subsequent Act are to restrain the effect of that general relation ; great inconvenience arising from it ; against which the Legislature had from time to time interposed. The first instance was the Statute of Frauds (2) ; under which land in the hands of a purchaser was bound only from the day of actually signing the judgment ; and goods only from the time of the actual delivery of the writ to the Sheriff ; a restriction positive and absolute ; without regard to the circumstance, which must frequently have occurred, that a purchaser of the goods knew, that a writ had issued. This Statute of William and Mary was [\* 423] passed with the same \* view : to prevent the general relation of judgments binding the land to the extent, that had before prevailed : confining that effect to judgments, entered in the particular mode, specified by the Act ; and since that Act the Courts have been extremely cautious not to put judgments in any different situation. Upon that ground a Court of law has refused liberty to amend ; as the amendment might affect purchasers ; *Sale v. Crompton* (3). The cases of *Evans v. Thomas* (4), and *Bean v. Elton* (5) merely show, that the Court exercises an authority over its records. The docket in the former case was perfectly regular ; and upon that ground the Court permitted a new Judgment Roll to be substituted for that, which was lost : an accident, which ought to be supplied : but the same Court in *Baker v. Baker* (6) refused to allow a judgment, not docketed in due time, to be docketed as of the ensuing Term : assigning the reason, that it might be a prejudice to purchasers or mortgagees ; and permitting it to be docketed only as of the Term, in which the application was made. The result of the cases at law therefore is an established rule not to do any act upon this subject to the prejudice of a purchaser.

As to the cases in Equity, there is no instance of a creditor obtaining greater relief in equity against the land than the law would give him. The cases upon the Registry Act (7), as *Le Neve v. Le Neve* (8), and those, in which upon the ground of notice relief has been given against the want of enrolment of a bargain and [\* 424] \* sale (9), have no general principle, applicable to this Act of Parliament. The ground, upon which a Court of

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(1) Statute Westminster, 2 ; 13 Edw. I. c. 18.

(2) Stat. 29 Ch. II. c. 3.

(3) 2 Str. 1209.

(4) 2 Str. 833.

(5) Andr. 12 ; 2 Str. 1077.

(6) Cited 2 Tidd's Prac. 840 ; Hilary Term, 35 Geo. III.

(7) Stat. 7 Ann. c. 20.

(8) 3 Atk. 646 ; 1 Ves. 64 ; Amb. 436.

(9) Stat. 27 Henry VIII. c. 16.

Equity interfered with the Registry Act, having reference to its object, is very distinct: the equitable right in the person, contracting for that specific estate; with regard to which a subsequent contract, with notice, for the same estate is considered a fraud. The object being to prevent frauds on purchasers, by notice through the medium of registry, the effect of the omission to register is, that the transaction stands as an equitable contract only; not a legal conveyance. Lord Hardwicke puts the case of *Le Neve v. Le Neve* upon fraud, by taking an estate with knowledge, that another person had an equitable claim upon it. A conveyance unregistered, if there was no subsequent conveyance, registered, was sufficient to pass the legal estate against the heir; and the only effect of the Statute was, that the unregistered Deed should not prevail against a subsequent purchaser with a registered Deed. If neither Deed had been registered, he, who could first register, would prevail: the Act transferring the preference from the date to the registry. Against this effect of the Statute at law relief was given in equity upon the ground of contract: the legal estate being acquired by taking and registering the subsequent conveyance with knowledge of the equitable title, subsisting under the previous conveyance. The cases of relief against the want of enrolment of a bargain and sale proceed upon the same ground: the legal estate being acquired with notice of the equitable title by the previous contract. The distinction in this case is, that a judgment gives no specific right to the land: no stipulation being made for an interest in the land; and the Statute, prescribing the particular mode, in which a judgment shall be made available against a purchaser, excludes every other mode.

\* In the case of *Thomas v. Pledwell* (1) there was, ac- [\* 425]  
 cording to the account of it in Viner, by the statement of  
 Counsel, appearing to be adopted by the Court, a clear Equity, upon  
 the express contract for payment out of the purchase-money; putting  
 aside all consideration of the date of the judgment. If in *Hickey v.*  
*Hayter* (2) the executor had notice of the judgment, not docketed,  
 could the creditor, who according to *Steele v. Rooke* (3) could not  
 prevail at Law, have come into Equity; insisting, upon that notice,  
 that the executor was bound to pay him, as a judgment creditor; and  
 would be liable for paying other creditors, not in equal degree? That  
 could not have been maintained: yet why, if this Equity holds as to  
 a purchaser, should it not prevail equally in that case, as to the ad-  
 ministration of personal estate? Upon none of the principles, which  
 govern a Court of Equity, can it be maintained, that, the Legislature  
 having cut down a judgment, with regard to the time of binding the  
 heir, it is to be set up again. The reasoning would apply equally to  
 the case of a judgment, signed merely without even a partial entry;  
 but the effect must be a repeal of the Act of Parliament. This case  
 is open to a peculiar inconvenience, which makes the objection

(1) 2 Eq. Ca. Ab. 599, pl. 25; 7 Vin. 53, pl. 5.

(2) 6 Term Rep. 384.

(3) 1 Bos. & Pul. 307.



extremely unreasonable. Judgments in the name of Davis must be very numerous; to obviate which difficulty conveyancers require a declaration in writing by the vendor, that those judgments do not relate to him; and he must procure that declaration also from the attorneys of all those parties. That inconvenience does not exist in the same degree, where the judgments are properly docketed; as the Roll, carried in, and numbered, is to be found; containing a copy of the declaration; with some description, perhaps not very [\* 426] precise; but considerably \* diminishing the difficulty. This objection stands, not upon any special contract, that would charge the land in the hands of a purchaser, or any express notice from the creditor, that he has the judgment; relies upon it; and expects payment; but upon the single circumstance, that in a search for judgments this imperfect document has been found. The case of *Forshall v. Cole* (1), is an express decision, never contradicted, that notice is not material.

Sir *Samuel Romilly*, in reply.—This question cannot depend upon any particular circumstances; as that the person, against whom this judgment issued, happens to have a common name. There is no doubt, that the judgment was against this Plaintiff; and the same inconvenience must exist in the case of docketed judgments. In *Thomas v. Pledwell* there was certainly the circumstance of fraud: but there must be some inaccuracy; and it is difficult to conceive, that Lord Macclesfield expressed what is attributed to him. How from the want of value could that agreement be inferred: would not the conveyance have provided for that, if agreed on; and would not that allowance have excluded the point of notice? Suppose a creditor in possession of a moiety of the land by *Elegit* under a judgment, not docketed; and the debtor to get rid of it, contracts to sell; and conveys to a purchaser: there is no doubt, that the purchaser might turn the judgment creditor out of possession at Law: and there is as little doubt, that Equity would support the judgment; if the purchaser had notice.

[\* 427] \*The Lord CHANCELLOR [ELDON].—The 18th section of the Registry Act creates great difficulty in my mind. Suppose the case of two judgments, not docketed, against a man, having lands in the counties of Middlesex and Essex: without any registry upon the doctrine of notice a purchaser of the land in Middlesex would be protected: then why, if the legal defect is nothing in the one case, shall it have complete effect in the other? Suppose a creditor by judgment, not docketed, got two *Elegits*, against the different moieties: and entered into possession; a strong fact as to notice: could a subsequent purchaser go upon the land against the effect of those executions? Suppose, the officer of the Court refused to docket the judgment; and the creditor, being entitled to have it docketed, applied to the Court: the answer has been given in the argument, that the Court would enter the docket, as at

(1) Sug. Law of Vendors and Purchasers, 564, 2d edit.; 5th edit. App. No. 19.

the time it ought to have been entered : but then what would be the situation of an innocent purchaser in the interval : would the Court by that Act, correcting the mistake of their officer, destroy that purchase ?

This demurrer must stand for judgment ; that I may endeavor to learn, what were accurately the circumstances of the case before Lord Macclesfield, and *Forshall v. Cole*. With regard to the observation, thrown out at the Bar, that the Registry Acts were overturned by Lord Hardwicke, I should feel myself bound to consider those decisions right, if they rested upon his authority alone ; but, confirmed as that doctrine has been ever since his time in cases directly upon those Acts, and admitted to be right in questions upon other Acts of Parliament, I \* dare not venture to contradict it. This Court, particularly in questions upon the Annuity Act (1), [\* 428] has acknowledged the distinction between Acts of Parliament, denying legal effect to certain instruments, and declaring them void to all intents and purposes ; collecting from the more extensive words the inference, that the equitable, as well as the legal, jurisdiction, was intended to be prohibited. Upon that express distinction the doctrine upon the Annuity Act has proceeded ; as, if that Act had merely declared, that the instrument should be void, all the contract would still have remained ; under which, though no interest passed, a right would have been created ; giving this Court the power to interpose : but, the Act declaring the instruments void to all intents and purposes, and its policy requiring, that they should not be set up to any intent or purpose, this Court refused by the exercise of its equitable jurisdiction to do what it had done upon the Registry Act, and the more ancient Act as to bargains and sales ; upon which Acts, though declaring, that the instrument, if not enrolled, or registered, shall be void, yet, there being a contract between the parties, that the one shall be vendor, and the other vendee, with a covenant for farther assurance, the conscience of the party was held to be bound notwithstanding the Statute. Upon similar grounds Lord Hardwicke held the same doctrine as to the Registry Act.

With regard to judgments very different cases may occur. There may be, first, a mere contract for a judgment : secondly, beyond that simple case, an express recital, that it shall be a judgment to affect land ; and \* there are many such. Then, taking [\* 429] into consideration the cases upon the Act for enrolling Bargains and Sales and the Registry Act, it is extremely difficult to say, if there is notice of such a contract as that, expressly reciting the purpose to give an interest in the land, by such execution as can be taken out, why, notwithstanding this Act of Parliament, that notice should not have the effect, which it would have in similar cases of contract against those other Acts of Parliament.

Another instance is a Judgment, obtained merely upon a contract

(1) Stat. 17 Geo. III. c. 26, repealed by Stat. 53 Geo. III. c. 141. See, *ante*, the note, vol. ii. 36 ; *Curtis v. Perry*, vi. 739 ; *Ex parte Yallop*, xv. 60, upon the Ship Registry Acts.

for a debt, by simple-contract, or by bond ; if the creditor obtained a Judgment, actually affecting the land, unless this construction of the Act of Parliament is to prevail, that no notice except by the actual docket can have any effect either in Law or Equity, (a doctrine open to much observation) it is very difficult to say, why a Court of Equity is not to apply its general doctrine upon notice by other means. In the case, that has been put, of two *Elegits*, upon Judgment not docketed, and actual possession under them, which is the strongest instance of notice, it must be contended, that, as there was no docket, a subsequent purchaser might turn that creditor out of possession. Insuperable difficulty appears to me to arise from the case I put of lands in the counties of Middlesex and Essex ; that as to the former there must be one decision under the Registry Act, and, as to the latter, a different decision under this Act of Parliament : upon the effect of notice, as supplying the want of the register in the one instance, and of the docket in the other. If this doctrine has been settled by decision, I shall be no more inclined to disturb it than the decisions upon the Registry Act ; as it is much better to rest upon decision, than to hazard, especially upon the subject of title, undoing what has been settled ; though perhaps not

[\* 430] \* to be perfectly reconciled to principle. It is surprising, that this question should not have been settled.

1810, *March 12th*. The Lord CHANCELLOR [ELDON] said, the opinion he had formed upon this case after much consideration was, that notice of the Judgment would bind the purchaser ; and he found from some notes that, having formerly consulted Lord Thurlow, Mr. Maddocks, and Mr. Lloyd, upon the point, they all conceived, that any notice is sufficient, by analogy to the case of the Registry Act ; and Lord Redesdale is clearly of the same opinion.

The Demurrer was accordingly allowed.

SEE, *ante*, the note to *Jolland v. Stainbridge*, 3 V. 478, as to the absurdity of holding that, because constructive notice, in certain cases, will bind, therefore, in the same cases, actual notice will not be binding. With respect to the distinction between instruments to which legal effect is denied by statute, unless they are perfected by certain forms, and other instruments, which the legislature has declared shall be void to all intents, unless the prescribed forms have been strictly complied with, see note 2 to *Curtis v. Perry*, 6 V. 739.

## MOSSOP v. EADON.

[ROLLS.—1810, FEB. 20, 27; MARCH 16.]

BILL for payment of a promissory note, which had been cut in two parts, one being produced, and the other alleged to be lost, and offering an indemnity, dismissed; as, proving the loss, an Action might be maintained (a).

THE Bill stated, that in July, 1799, the Plaintiff's wife, Catherine Mossop, then Catherine Johnson, widow, lent to the Defendant Matthias Eadon, the sum of 100*l.*; and to secure the re-payment, with interest, Matthias Eadon, and his son, Alexander Eadon, gave her their joint and several promissory note, dated the 15th of July, 1799, for 100*l.*, with interest, payable on demand. In August, 1800, the Plaintiff married Catherine Johnson. No interest was paid on the note for a considerable time. At length Mrs. Mossop wrote to Matthias Eadon to take up the note: some correspondence took place between them; and Matthias Eadon promised to \* pay all the interest due, and to give the Plaintiff a fresh [\* 431] note; requesting her to send him the note for that purpose. She accordingly cut the note in two parts; and in December, 1805, inclosed in a letter, sent by post to Matthias Eadon, that part, which contained the signatures of the Eadons.

The Bill charged, that one year's interest had been paid; and Matthias Eadon made a memorandum of such payment by indorsement on that part of the note, which is in the Plaintiff's possession, viz. "By one year's interest of this note 5*l.*, to the 15th July, 1800." The Bill prayed an account of the principal and interest due on the note; and that the Defendants may be decreed to pay what shall be found due; offering to indemnify them against the note; if it shall appear that the part, sent to the Defendant Matthias Eadon, was not received by him; or that the Defendants may be decreed to give a fresh note.

The Defendants by their Answer denied the loan; giving this account of the transaction; that Mrs. Mossop, before her marriage, was frequently at the house of the Defendant Matthias Eadon; and being about to return to town about the 15th of July, 1799, she said to him, "I have a 100*l.*; and you may as well have it;" and upon his saying, he had no occasion for it; as he did not want money at that time; she added, "Your son Alexander may want it; and I may meet with the collectors on my journey; and they may take it from me: so I had rather you had it than they: therefore take it; and give me your joint note; and if I never want it I will never ask you for it; and I shall never want it so long as the Bank of England stands. I annually receive the interest of 5000*l.*; and that is plenty for me."

(a) See, *ante*, notes (a) and (b) *Ex parte Greenway*, 6 V. 812; 1 Story, Eq. Jur. § 81.

The Defendant accordingly accepted the money ; and the note was given. The Answers denied, that it was the intention of Mrs. Mossop ever to demand payment of the principal or interest, or to take back the same or any part ; insisting, that she intended it to be, and in fact it was considered as, a gift, in acknowledgment of the kindness she experienced from Matthias Eadon, and as a compensation for her board and lodging. The Answer denied the application to take up the note ; that Matthias Eadon ever promised to pay the interest, or to give a fresh note, &c. ; suggesting, that if the note was cut, as stated in the Bill, it was with the purpose of cancelling it ; denying, that Matthias Eadon made any memorandum upon the note of payment of 5*l.* for one year's interest or for any other purpose. The Defendants also insisted on the Statute of Limitations.

In support of the case, made by the Bill, the Plaintiff produced that part of the note, to which the Bill referred, as being in his possession ; and proved the fact, as to cutting the note, and putting one part in a letter ; which Mrs. Mossop said she was going to send to Matthias Eadon, and acknowledgments by the Defendants in conversation as to money due from them to the Plaintiff and his wife.

Mr. *Leach* and Mr. *Roots*, for the Defendants, took the objection, that the Remedy was at Law ; as, according to the case of *Read v. Brookman* (1) the note might be declared upon, as lost ; and the contents might be proved : or the declaration might be upon the *indebitatus assumpsit*.

[\* 433] \* Mr. *Richards* and Mr. *Heald*, for the Plaintiff, insisted, that the declaration must be upon the note itself ; and the jurisdiction of this Court is not destroyed by the Courts of Law, assuming a jurisdiction in such cases.

The MASTER OF THE ROLLS assented to that ; but expressed a doubt as to exercising the jurisdiction in the instance of a lost note ; and the cause stood over for the purpose of looking into the authorities.

1810, Feb. 27. Mr. *Richards* and Mr. *Heald*, for the Plaintiff, contending for the equitable jurisdiction, though an action might be maintained, referred to *Walmsley v. Child* (2) *Whitfield v. Faussett* (3), and *Glynn v. The Bank of England* (4).

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—It is very clear, that an action would have lain upon the note : if you had proved the loss. The single question is, whether the indemnity you offer is not a ground for coming here. The Court of Law could not take notice of it ; and give a conditional judgment : but Equity gives that relief at the same time that it orders payment of the money. The

(1) 3 Term Rep. 151. See, *ante*, the observations of the Lord Chancellor upon that case, vol. xiii. 444 ; and the note, v. 238.

(2) 1 Ves. 341.

(3) 1 Ves. 387.

(4) 2 Ves. 43.

other half of the note may be in your possession : therefore it is fit, that you should indemnify them against the possibility, that the two parts may be brought together, and passed into another hand. As to the merits I have no doubt. They are proved by the clearest evidence.

*March 16th.* Mr. *Richards* and Mr. *Heald*, for the Plaintiff, insisted that the mere loss of the \* instrument gives this [\* 434] Court jurisdiction : the rule is so stated by Lord Redesdale (1) ; and it does not depend upon the right to require an indemnity ; observing, upon the objection, that the note from that part, which was produced, appeared not to be payable to order, that a distinction had never been made, whether the note was negotiable, or not.

The MASTER OF THE ROLLS.—Your argument is in direct contradiction to that of Lord Hardwicke ; who in the case of *Walmsley v. Child* (2) assumes, that this Court has no jurisdiction, except for the purpose of ordering an indemnity, where indemnity is necessary. I am very unwilling to turn the Plaintiff round ; thinking, upon the merits, that the justice of the case is with him : but at the same time I am afraid of breaking in upon the rules, established as to the jurisdiction of the courts, that, where a party can recover at Law, he ought not to come into Equity.

The Bill was dismissed.

SEE notes 2, 6, to *Ex parte Greenway*, 6 V. 812.

### PAYLER, *Ex parte*.

ORDER in Bankruptcy on Petition for sale of premises, subject to an equitable mortgage : the General Order (8th March, 1794,) applying only to legal mortgages.

THIS Petition was presented by an equitable mortgagee ; praying an Order for sale of the mortgaged premises for the usual purposes by the assignees under a Commission of Bankruptcy against the mortgagor.

Mr. *Montague* suggested, that a special Order was unnecessary ; if the sale might take place under the General Order (3) ; which had been held by Lord Erskine in *Ex parte Donald* (4) to extend to

(1) Mitf. 105, 6.

(2) 1 Ves. 341.

(3) General Order in bankruptcy, 8th March, 1794.

(4) February 6th, 1806. Under a Commission against Joseph Bally, in 1826, the Vice-Chancellor directed the Commissioners to inquire, whether there was an equitable mortgage.

equitable mortgages: but there is a considerable difference of opinion upon it.

Mr. *Roupell*, in support of the Petition, and Mr. *Cooke* (*Amicus Curie*) said, the constant practice is to have a special Order in the case of an equitable mortgage.

The Lord CHANCELLOR [ELDON].—I rather doubt, whether it would be provident to extend the General Order to a mere equitable mortgage. We have often had extremely nice and difficult questions of fact, arising with regard to equitable mortgages (1). I apprehend, Lord Rosslyn considered the General Order as applicable only to legal mortgages. I shall make the Order upon this Petition; and, if it should prove expedient to extend the General Order to equitable mortgages, it will be better to declare that by a supplemental Order.

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SEE note 4 to *Ex parte Coming*, 9 V. 115.

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## CHURCH v. BARCLAY.

[1810, MARCH 21.]

PLAINTIFF, appealing from a Decree, dismissing the Bill, entitled to the usual Order for the production and inspection of deeds (a).

MR. RICHARDS for the Plaintiff, moved, that deeds should be left with the Clerk in Court for the usual purposes of inspection, &c.; and that they may be produced \* at the hearing of the Appeal from the Decree at the Rolls, dismissing the bill.

Mr. *Hart*, for the Defendant, opposed the motion, as contrary to practice in the instance of an appeal; the party having had the benefit of the inspection before the original hearing; observing farther, that this bill was dismissed by the Master of the Rolls without hearing the Defendant; and was therefore out of Court.

The Lord CHANCELLOR [ELDON], held the Plaintiff entitled to this motion; and made the Order accordingly.

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As to the cases in which a production of instruments will be ordered, see, *ante*, the note to the *Anonymous case*, 1 V. 29; note 1 to *Lady Shaftesbury v. Arrowsmith*, 4 V. 66; and the note to *Darwin v. Clarke*, 8 V. 158.

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(1) See *ante*, *Ex parte Mountfort*, vol. xiv. 606; *Ex parte Coming*, ix. 115, and the note, 117.

(a) As to the right of one party to a discovery and inspection of title-deeds in the possession of the other party, *Wigram, Discovery*, (1st Am. ed.) 2-4; note (a) *Shaftesbury v. Arrowsmith*, 4 V. 66; note (a) *Ford v. Peering*, 1 V. 72; 2 Story, Eq. Jur. § 1491, 1492.

## READ v. PHILIPS.

[1810, MARCH 23, 24.]

MEMBER of Parliament refusing to enter an appearance, the Court appointed a Clerk in Court to enter an appearance for him under Statute 45 Geo. III. c. 124, s. 3.

Trader, having privilege of Parliament, by not paying money under an Order of Court commits an act of Bankruptcy by Statute 45 Geo. III. c. 124, [p. 437.]

THE Bill, filed in May 1809, prayed a foreclosure. The Defendant being a Member of Parliament, process had issued to a sequestration for want of appearance; and a motion was made, that the Defendant may appoint a Clerk in Court; and cause an appearance to be entered; and in case he shall not cause an appearance to be entered before the 9th of May, the Court may appoint a Clerk in Court for him. The motion was made on notice; and affidavit, that the Defendant has no goods and chattels, lands or tenements, by which the sequestration can be made available to enforce his appearance.

Mr. *Hall*, in support of the Motion.—If this application, under circumstances, not strictly within, but very near, the Act of Parliament (1), should \* not succeed, the effect will be a [\* 437] total failure of justice. The title of the Act of Parliament is very general; speaking of persons absconding to avoid process, or refusing to appear: but the enacting clause is not co-extensive. The first clause applies distinctly to the case of absconding, to avoid process: but the second clause is confined to persons, taken upon *Habeas Corpus*, and refusing to enter an appearance, &c. The situation of this Defendant has analogy to that of a corporation; which is not liable to attachment. Orders have been frequently made before appearance; as in the case of injunction, proceeding upon the ground of contempt; with some distinction; according to the nature of the injunction; whether prohibitory or mandatory. Thus, an injunction has been obtained against an infant Peer for want of appearance; and a Clerk was assigned to appear and answer for him.

The Lord CHANCELLOR [ELDON] referred to a late Act of Parliament (2), as decisive upon this question, observing, that many provisions of that Act are not generally known: one, for instance, by which if a Member of Parliament will not pay money under an Order of the Court, the non-payment is made an act of bankruptcy (3).

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SEE the note to *Downes v. Thomas*, 7 V. 206.

(1) Stat. 5 Geo. II. c. 25.

(2) Statute 45 Geo. III. c. 124. The third section directs, with regard to a Defendant, having privilege of Parliament, that upon the return of process of Sequestration for not putting in an appearance the Court may appoint a Clerk in Court to enter an appearance for him.

(3) Sec. 7, repealed by Stat. 6 Geo. IV. c. 16, s. 1, and the case provided for by s. 11, 12.



## BECKFORD v. WILDMAN.

[1810, MARCH 12, 21, 27.]

THE object of the Bill being to set aside Deeds, the Court will not on Motion go beyond the usual liberty to inspect, &c. and for production at the Hearing, by an Order to deposit them with the Master for safe custody, without a special case; establishing danger, that they may not be produced. Therefore, where most of the circumstances relied upon, viz. variations in two Deeds, appeared upon the Answer, the Order was limited to production at the Hearing (a).

THE object of the Bill in this case was to set aside two indentures of conveyance of the Quebec Plantation, in Jamaica, with the negroes, stock, &c. dated in June 1790 and November 1791; as obtained by a general Agent and Solicitor by misrepresentation as to the value and influence. The Defendant was his heir at law. A Motion was made by the Plaintiff, that these instruments, admitted by the answer to be in the Defendant's possession, may be deposited with the Master for safe custody; upon an affidavit, stating generally, that there were material variations between them.

The Lord CHANCELLOR [ELDON].—Where the object of the suit is to destroy the deed, the Plaintiff has a right to have it produced, and left in the hands of the Clerk in Court for the usual purposes of inspection, &c.; as from the right to have it set forth in the answer the consequence follows, that the instrument itself should be before the Court at the hearing: but I do not know an instance of the Court's taking possession of the deed in the interval upon mere suggestion in a Bill, filed with that view. The Court will not in this stage of the cause be active in taking the deed out of the hand of the party, whose deed it is, unless a special ground is made out; showing, that there is reason to believe, the deed will not be produced at the hearing. Upon the same principle the affidavit of the Solicitor, that there is a material difference between these instruments, cannot have the effect of establishing, that there is [\* 439] that special case, upon which in a late instance (1), at the last Seal, I made that Order.

The Motion was renewed upon farther affidavits; stating more particularly the variations between the instruments.

Mr. Richards, Sir Samuel Romilly, and Mr. Heald, in support of the Motion.—It is very material, that these deeds should be produced at the hearing of the cause. They are not only not exact

(a) 2 Madd. Ch. Pr. 396, 397. As to the right of one party to a discovery and inspection of title-deeds in the possession of the other party, Wigram, Discovery, (1st Am. ed.) 2-4; note (a) *Shaftesbury v. Arrowsmith*, 4 V. 66; note (a) *Ford v. Peering*, 1 V. 72; 2 Story, Eq. Jur. § 1491, 1492.

(1) *Lambert v. Chapman*; see 1 Swanst. 125, *The Princess of Wales v. The Earl of Liverpool*; *Jones v. Lewis*, Tyler v. Drayton, 2 Sim. & Stu. 242, 309; *Balch v. Symes*, 1 Turn. 87.

duplicates, but the affidavits point out very important variations. The second deed in date was registered: the other was not; though it was sent to Jamaica for that purpose. The first deed recites, that the grantor, having taken into consideration the laborious attention of the agent, since his father's death, &c. proposed to convey to him a large tract of land in Jamaica, describing it as containing one thousand two hundred acres more or less; and the consideration expressed is five shillings. The second deed, having no recital, purports to be a conveyance in consideration of ten shillings, and divers other good and valuable considerations, &c. of one thousand seven hundred acres; and in lieu of a covenant in the former deed, for completing the settlement of the plantation, by which the expense, to be advanced by the grantor, was limited to 5000*l.*, there is a covenant, that the grantor shall continue the workmen, &c. without any limitation in extent; and there is also a more extensive covenant for warranty. These very material variations being \* pointed out, furnishing the ground of most important observation, upon [\* 440] which the Decree will probably depend, under such circumstances the Court will require, that these instruments shall be deposited in the Master's office.

In a late case, *Addison v. Walker*, a Motion was made, that the draft of a title-deed might be deposited with the Master; on affidavit, that the settlement, prepared in pursuance of that draft, varied from it; the Plaintiff being entitled to the estate according to the draft; the Defendant according to the deed; and the object of the Bill being to reform the deed. The Defendant objecting, that the Plaintiff had no right beyond the liberty of inspecting and taking a copy of the draft, your Lordship considered the variations so important, that the Plaintiff was entitled at all events to be certain of the production of that draft at the hearing. Applying that authority to this case, there can be no more objection as to the deed of 1790 than as to the draft in that instance: this instrument, not registered, being merely an article of evidence in the cause to prove the fraud alleged.

Mr. *Bell* and Mr. *Shadwell*, for the Defendant.—Where the object of the Bill is to set aside the deed, this Order is not to be obtained of course. The instrument must be proved to be material to support the case made: secondly it must appear, that there is great reason to believe, that the instrument will not be forthcoming; as in the case of *Addison v. Walker*; where the husband had agreed to a draft of a settlement: afterwards, as appeared by the answer, that draft was altered: a new deed was framed; the Defendant, stating, that he had not the draft, represented the effect to be a limitation to the husband in fee: but upon the production of the instrument the limitation appeared to be to the survivor of the \* husband and wife in fee; a direct contradiction to the answer. It is [\* 441] true, there are material variations between these instruments: the first deed reciting fully the services, which were the inducement to the conveyance; as to which the other deed is silent; secondly, as to the covenant by the grantor to lay out money in im-

provements: by the first deed confined to 5000*l.*; by the second unlimited; which is accounted for however as a consequence of the omission to register the first deed: a considerable sum having been laid out, the covenant was framed generally, with a view to completing the buildings, which had been begun; thirdly, the difference in the number of acres. Are such variations sufficient to produce this effect; and what reason is there for supposing, that these instruments will be withheld: the Answer, filed in August, stating them both; though as to the first the Defendant was not called upon to say any thing.

Mr. *Richards*, in reply, said, the most important variations do not appear in the Answer: for instance, the difference as to the number of acres was suppressed; and even supposing the Plaintiff to have copies of these instruments, the production of the instruments themselves, alleged to be the effect of influence over the grantor, may be most material.

The Lord CHANCELLOR [ELDON].—This sort of motion is very unusual; and may lead to most important consequences. In the case of *Addison v. Walker*, the Answer representing the settlement to be pursuant to the draft, and stating the substance of the draft falsely, I thought myself authorized to go rather farther than the general practice of the Court permits. Whether these instruments are to be considered as title-deeds, or not, it is clear, that, where the object of the Bill is to set aside the grant, the Court must have the power of so dealing with the instrument, as to be reasonably [\* 442] sure of having it produced upon all occasions, when its production may be necessary. That sort of title-deed must therefore be produced for the purpose of being proved before the Examiner; if necessary for the discovery of its contents; and must be produced at the hearing; if necessary (1); but the Court does not take the custody of it in the interval without a special case. The variations in these instruments, stated this day, do appear to me important: first, the special recital in the deed of 1790: secondly, the general reference by the second deed to divers other good and valuable considerations: thirdly, the variation in the quantity of acres; and fourthly, the variation in the covenants. They may be accounted for: but they appear to me to be so important, that they must be accounted for. The only ground therefore, upon which the motion can be opposed, is the other; as to the danger, that these instruments may not be produced; and I will look into the Record with that view.

March 27th. The Lord CHANCELLOR [ELDON].—The foundation of this motion is, that these deeds varied very materially; that those variations would require to be well considered at the hearing; and that there was some degree of *mala fides* in the Defendant; calling upon the Court to preserve them with more anxiety than in ordinary

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(1) *Ante*, *Darwin v. Clarke*, vol. viii. 158, and the note, 159.

cases. It appears to me, that the variations between the two instruments are material: first, in the recitals: secondly, in the quantities of the premises conveyed: thirdly, in the covenants. With regard to the recitals however, even if the deeds were lost, and no copies could be proved, yet the benefit of that difference would be had at the hearing; as all, that appears in the recitals, and the covenants, and the causes of the difference, are stated in the Answer.

The only \* point therefore, upon which this extraordinary [\* 443] application rests, is the difference of the quantities; and the circumstance, that the quantity of acres, conveyed by the first deed, is not mentioned in the Answer: but upon the whole Answer that does not appear to be a fraudulent concealment. Therefore all, that can be done upon this motion, is an Order for a production of the instruments at the hearing. \_\_\_\_\_

SEE the note to *Cotton v. Harvey*, 12 V. 391; the note to the *Anonymous case*, 1 V. 29; note 1, 2, to *Ford v. Peering*, 1 V. 72; and the note to *Darwin v. Clarke*, 8 V. 158.

• WILLIAMSON v. THOMSON.

THOMSON, *Ex parte*.

[1810, MARCH 29; APRIL 3.]

CERTIFICATES of the East India Company, on payment into their treasury in India, and a Navy bill, remitted, indorsed by the testator to his agent in England, being at the time a creditor, if they did not pass at law by the indorsement, were, after the death of both parties, the agent having become bankrupt, held not to pass in equity; the inference from the absence of evidence of a specific appropriation being against the assignees; who had obtained possession of all the letters, &c.

THIS Petition, under a Commission of Bankruptcy against George Thomson, stated that in the year 1780, David Thomson, the commander of, and jointly entitled with his brother, George Thomson, to several shares in the ship *The Earl of Dartmouth*, in the service of the East India Company, took up several goods, to take with him to India, upon their joint securities; and they had other transactions together; in the result of which David was, and continued at his death, considerably indebted to George. Having sold those goods in India, David Thomson laid out part of the money in purchasing other goods for his homeward investment; and paid part, particularly a sum of 12,000*l.*, into the Company's Treasury at Bengal, on his privilege, as Commander; \*receiving from the [\* 444] Treasury certificates of the payment, to entitle him to receive the amount from the treasurer of the Company in England. He laid out a farther sum of 1533*l.* 6*s.* 8*d.*, in a Navy or Victualing Bill; which was indorsed over, and made payable to his order in England. David Thomson, previously to his sailing from India

on his homeward voyage, remitted to his brother George, who was his general agent in England, among other money and effects, the said East India Certificates, and Navy or Victualling Bill, indorsed to George Thomson, or order; directing him to effect insurances on account of David, on the property he had taken on board on his homeward voyage.

The Petition farther stated, that before the arrival in England of the letters, containing those remittances and directions, viz. on the 4th of May, 1782, George Thomson became a bankrupt. In June, 1782, also before the receipt of the letters in England, the ship *Earl of Dartmouth* was lost on her homeward voyage, with all her cargo. Captain Thomson escaped; but died on board another ship on the 8th of September, 1782; having by his Will of that date appointed his brothers George and William, the petitioner, his executors. The assignees under the Commission against George Thomson, obtained possession at the India House of all letters, directed to him, and among them of those, containing the remittances, and directions for insurance; and they effected insurances accordingly to a certain extent, on behalf of David Thomson, on his goods on board the said ship. George Thomson having obtained probate, his assignees, procuring his indorsement of the East India Certificates, received the money, secured thereby, amounting to 12,155*l.* 16*s.* 10*d.*; and also 1533*l.* 6*s.* 8*d.* secured by the Navy or Victualling Bill. They also recovered upon the insurances, effected by them, and by [\*445] David Thomson himself, upon his own property, and upon the joint property of himself and George Thomson in The *Earl of Dartmouth*; in the whole 13,119*l.* 14*s.* 9*d.*

In the year 1786 a Bill was filed by specialty creditors of David Thomson against George Thomson, and the assignees under the Commission, and against the widow and three infant children of David Thomson, for an account and payment of the money, so received by the assignees; as being part of the personal estate of David Thomson. By a Decree, pronounced on the 21st of April, 1788, an account was directed of the personal estate of the testator, come to the hands of the bankrupt and his assignees; and under different Orders considerable sums were paid into Court; composed of the separate estates both of George and David Thomson; producing in Bank Annuities 29,448*l.* 2*s.* the separate estate of George; and 47,332*l.* 4*s.* 10*d.* the separate estate of David.

The Petition farther stated, that by an Order, dated the 18th of March, 1789, without notice to the petitioner or any of the other parties in the suit, it was ordered, that the sum of 40,000*l.* should be raised by sale of the Bank Annuities; which sum was accordingly raised by sale, not only of the annuities, forming the estate of the bankrupt, but also of part of the fund, which was the estate of David: producing 17,943*l.* 13*s.* 3*d.* sterling; which was divided among the creditors under the Commission; but 9390*l.* 19*s.* 8*d.* was divided among creditors of David; for whose debts George was only a surety; who had however been admitted under the Commis-

sion. The bankrupt died in 1804 ; and probate of the Will of David Thomson was granted to the petitioner. In Trinity Term 1806 the creditors of David Thomson filed \* a Bill of Revivor and Supplement against the assignees of George Thom- [\* 446] son under a renewed Commission of bankruptcy, and against the petitioner William Thomson, and the widow and children of David.

The Master's Report under a Decree in that cause stated, that the late assignees of George Thomson had received on account of the personal estate of David, 30,558*l.* 6*s.* 3*d.* ; that of 82,364*l.* 0*s.* 7*d.* Bank 3 per Cent. Annuities, standing in the name of the Accountant-General, in the matter of George Thomson, 62,122*l.* 8*s.* 9*d.* arose from, and was purchased with, the personal estate of David Thomson, which came to the hands of those assignees. By a farther Report the Master stated, that at the time of the bankruptcy there was due to George Thomson, from the estate of David, 20,783*l.* 14*s.* 10*d.* ; that the moneys, belonging to the personal estate of David Thomson, which came to the hands of the assignees of the bankrupt, consisted of 13,117*l.* 14*s.* 9*d.* received from the Underwriters on Policies of Insurances, 12,155*l.* 16*s.* 10*d.* the amount of twenty-one certificates, remitted from India ; and of a Navy or Victualling Bill for 1533*l.* 6*s.* 8*d.* ; that with respect to the sums, received from the Underwriters, the assignees in consequence of written directions from David Thomson to George Thomson, effected insurances on account of David on his property on board the Earl of Dartmouth ; and in consequence of the loss of that ship those sums insured were received by the assignees.

With respect to the amount of the certificates, and the Navy or Victualling Bill, the Master found, that the certificates were procured from the Company's Treasury in Bengal, and remitted with the said Bill, by David Thomson to the bankrupt, inclosed in letters or covers ; as appeared from the examination of the bankrupt: the said \*certificates having been previously indorsed by David Thomson, and made payable to the order of George Thom- [\* 447] son, for value received ; and the Master farther found, that David Thomson died, and George Thompson became a bankrupt, before the said certificates and Bill arrived in England ; and upon their arrival the assignees obtained possession from the East India Company of the letters, in which they were inclosed ; and they were duly accepted, and in the usual course paid to the assignees. The Master farther found, that the letters, inclosing those Certificates and Bill, and all the books and papers, relating to the affairs of David Thomson, were taken possession of by the assignees of George Thomson, claiming as personal representative of David ; and were never returned ; and by reason thereof, and by the deaths of the assignees, and of the bankrupt, and David Thomson, it cannot now be ascertained, whether the sums, payable by the said Certificates and Bill, were appropriated, or intended to be appropriated, to any particular purpose, or carried to any particular account, upon condition,

or otherwise : the Master was therefore unable to state more particularly, upon what terms or conditions the said sums came to the hands of the assignees.

The Petition then stated, that the assignees under the Commission claim all the produce of the East India Certificates and Navy Bill, as having passed immediately to the bankrupt on the indorsements before his bankruptcy ; and to be repaid out of the insurance money all such sums as they have paid by way of dividends to the creditors of David, for whose debts the bankrupt was surety only ; that, as the moneys, arising from the policies of insurance, are by the Report clearly ascertained to be the separate, unadministered, personal estate of David Thomson, the petitioner submits, that so much of the fund in Court in this matter as arose from the produce [\* 448] of such Policies of Insurance may be transferred from this matter to the credit of the cause for the purpose of distribution ; for which transfer, liberty to apply had been reserved.

The Petition prayed, that of the sum of 71,804*l.* 5*s.* 5*d.* Bank Annuities, standing in the name of the Accountant General, in trust in this matter, the sum of 60,179*l.* 10*s.* (being so much thereof as arose from the personal estate of David Thomson, received by the assignees, on the Policies of Insurance), may be transferred from the credit of this matter to the credit of the cause.

Another Petition was presented, in the cause, by William Thomson, Elizabeth, the widow of David Thomson, and her trustees, for the same purpose ; stating the same facts. It was also stated, that the fund, certified to have arisen from the personal estate of David Thomson, had accumulated to 65,929*l.* 6*s.* 7*d.* Bank Annuities ; forming part of 71,804*l.* 5*s.* 5*d.* Bank Annuities, standing in the name of the Accountant-General, in the matter of George Thomson, of which the sum of 5749*l.* 16*s.* 7*d.* was the residue of the Bank Annuities, and the accumulation which arose from the East India Certificates, and the Bill, after the sale thereof by the assignees in 1789 ; and 60,179*l.* 10*s.* residue of the said 65,929*l.* 6*s.* 7*d.* was the personal estate of David Thomson, which arose from the produce of the insurance money.

Sir *Samuel Romilly* and Mr. *Trower*, for the assignees under the Commission of Bankruptcy, against George Thomson.—From the very special indorsement of these certificates, and the other circumstances, established by the Master's Report, is to be collected [\* 449] the intention to remit them to George Thomson, for his own use, in satisfaction of the debt, due to him ; which is also ascertained by the Report. By the practice at the India House indorsements of these instruments is not necessary ; and some meaning must be attributed to the indorsement in these special terms, "to the order of George Thomson for value received." Value having been received, and a debt constituted, the effect must be the same, as if a bill of exchange had been remitted. What possible object can be supposed, except an appropriation to

the debt, then due to George. The debtor, being then embarking for England, liable to the danger, which proved the event, of never reaching home, may fairly be supposed to intend to liquidate that debt, which he knew to be due.

With regard to the bond-debts, proved under the Commission, in which the bankrupt was only a surety for his brother David, the general creditors are entitled to stand in the place of the creditors so paid; and to be reimbursed out of the assets of David, the principal debtor; as in *Tynt v. Tynt* (1) it was held, that in the administration of assets a surety is not to be called upon, until all the assets of the principal have been exhausted. The general creditors of the bankrupt have a right to stand in the place of those speciality creditors, with regard to the payments they have received by dividends under the commission. In *Ex parte Crisp* (2) the rule is stated thus; that, where there is a principal and surety, and the surety pays off the debt, he is entitled to have an assignment of the security; in order to enable him to obtain satisfaction for what he has paid; and a party, entitled to \*an assignment of the se- [\* 450] curity, stands in a Court of Equity, as if he had it.

Mr. *Hollist*, for the Petitioners, the representatives of David Thomson.—These certificates, stating merely, that the person in India has paid a certain sum of money into the Company's Treasury, are not capable of transfer by indorsement. An action upon them against the Company could be maintained only by the party, to whom they are issued: not by a third person, claiming as indorsee. Such an instrument has nothing of the general nature of a bill of exchange: rather resembling a promissory note, before the Act of Parliament (3), which made them negotiable. The death of David Thomson therefore prevented all means of acquiring an interest in this property. Nothing, that passed afterwards, could give the assignees of the bankrupt any title to it; as in the case of *Tate v. Hilbert* (4) the death was a countermand of the order upon the banker.

*April 3d.* The Lord CHANCELLOR [ELDON].—Unless the legal effect of the circumstances, stated by the Master's Report, is, that these certificates became the property of the bankrupt, this Court is called upon to make that declaration upon the intention to appropriate them; and, whether the act of the assignees, or, as is much more probable, the act of the bankrupt himself, has prevented the Court seeing, what was the appropriation intended, every thing is to be inferred, that ought to be inferred against them. My opinion therefore is, that this is part of the estate of David Thomson.

By the statute of 51 Geo. III. c. 64, s. 4, bonds issued by the East India Company are transferable by delivery of the possession thereof; and, in general cases, the mere production of a negotiable instrument is sufficient to warrant payment of the amount expressed therein, to the party who produces it: see, *ante*, note 3 to *Tate v. Hilbert*, 2 V. 111.

(1) 2 P. Will. 542.

(2) 1 Atk. 133; see 135.

(3) Stat. 3 and 4 Ann. c. 9.

(4) *Ante*, vol. ii. 111.



## ROBERTS v. COOKE.

[ROLLS.—1810, FEB. 15, 16; MARCH 12.]

GENERAL residuary disposition of real and personal estate, "not hereinbefore specifically disposed of" held to comprehend specific legacies lapsed: the word "specifically" being construed "particularly" (a).

ROBERT FREEMAN by his Will, dated the 22d of January, 1784, after several devises and bequests, gave and bequeathed to John Cox the sum of 2500*l.* secured on mortgage of estates in the Isle of Ely, and County of Cambridge, with all interest, which might happen to be due at his decease, to and for his own use and benefit. The testator also gave and bequeathed to John Cox the farther sum of 700*l.* secured on mortgage of Merton College lease, together with all interest, which might happen to be due at his decease, to and for his own use and benefit; and he also gave to the said John Cox all his stock, standing in his name, and property in 3 per cent. Consolidated Bank Annuities, together with all such interest, dividends, or proceeds, as might happen to be due for the same at the time of his decease, to and for his own use and benefit, subject to an annuity of 20*l.* to Mary Lovell for life. After several other devises and bequests, and legacies to his executors and trustees hereafter named for their trouble, the testator gave and bequeathed all the rest and residue of his real and personal estate whatsoever and wheresoever, and of what nature or kind soever the same might consist of, not herein-before specifically disposed of, unto Thomas Alderson Cooke and Thomas Pulvertoft, their heirs, executors, administrators, and assigns, upon trust, that they should as soon as conveniently might be after his decease sell the same; and the moneys arising therefrom should pay unto and amongst Mary Image, Thomas Cox, and John Cox, in equal shares and proportions, and for their own respective uses and benefits; and he gave and bequeathed such trust moneys to them accordingly; \* and appointed Thomas Alderson Cooke, Samuel Lane, and William Swalman, his executors.

John Cox died in December, 1804, during the life the testator; who died in April, 1805; leaving Mary Image, and Thomas Cox, his sister and brother of the half blood, and Hannah Roberts, Mary and Ann Cox, the children of John Cox, who was also his younger brother of the half blood, his next of kin.

The bill was filed by Hannah Roberts, with her husband, and Mary and Ann Cox; and, after a decree, directing the usual accounts and inquiries, the cause being heard for farther directions, the question was, whether the sums of 2500*l.* and 700*l.* and the stock, which became lapsed legacies by the death of John Cox in the

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(a) As to personal property, a residuary clause not only carries all not disposed of, but every thing which in the event turns out not to be disposed of. See *ante*, note (b) *Brown v. Higgs*, 4 V. 708.

testator's life, should go to the next of kin, or to the residuary legatees.

Mr. *Richards*, Sir *Samuel Romilly*, Mr. *Hollist*, and Mr. *Bell*, for the Plaintiffs.—These specific legacies are separated from the general residue : and excepted from the effect of the residuary clause ; as if the testator had declared expressly, that he gave all his personal property, except what had been specifically disposed of. The terms, in which this residuary clause is restrained, though not an express exception, are equivalent to that. The consequence of the lapse therefore is, that these legacies, not being comprehended in the residuary clause, must go to the next of kin.

\* Mr. *Hart* and Mr. *Fearnley*, for the Defendants, the two [\* 453] surviving residuary legatees.—This is merely a question of intention. According to the general rule of construction, all, that is not effectually taken out of the bulk of the property, whether by the event of the death of a legatee in the testator's life, or, as in the case of *Shanley v. Baker* (1), the disposition being illegal, falls under the residuary clause ; and there is no distinction upon the effect of lapse between specific and pecuniary legacies ; nor can any difference arise from the terms, in which this residuary clause is expressed.

Mr. *Richards*, in reply, observed, that this Will gives several legacies besides these specific legacies ; and though, it is true, generally, that the testator, making a residuary disposition, is supposed to contemplate whatever may be left after the debts and legacies are satisfied, some meaning must be attributed to these words ; which, understood in their plain legal sense, are equivalent to an express exception of the specific legacies. In *Shanley v. Baker* the residuary clause applied to all the legacies : but here are legacies of two descriptions : the one accepted : the other not.

The MASTER OF THE ROLLS declared, that the legacies, lapsed by the death of John Cox in the testator's life, passed under the residuary clause : the words, "not hereinbefore specifically disposed of," meaning only not particularly disposed of : the testator could not intend to die intestate with regard to all sums specifically bequeathed, and testate as to all general pecuniary legacies : which would be the effect of the Plaintiff's construction. The Decree was made accordingly ; declaring, that the share of John Cox the residue, as undisposed of, must go to the next of kin.

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1. THAT a will must be specially penned in order to restrict a residuary bequest of personal property to a limited operation, and that a court of equity will be much disinclined to create, by adopting such a construction, a partial intestacy, see, *ante*, note 3 to *Maberley v. Storde*, 3 V. 450.

2. There is evidently some mistake in the concluding sentence of the report of the principal case : the decree would not have been according to, but in direct contradiction of, the opinion expressed by Sir William Grant, when he delivered his judgment, had it assigned the lapsed share to the next of kin, instead of determining that it was comprehended in the general residuary bequest.

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(1) *Ante*, vol. iv. 732.

## COLLINS v. PLUMB.

[1810, APRIL 2, 3.]

Covenant upon a conveyance in fee with the grantors, lessees of water-works, not to sell or dispose of water from a well to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns.

Whether the covenant runs with the land, so as to bind, and be enforced by, assignees, whether it is contrary to the policy of the law, and as to the effect of a renewal of the lease, *Quære*.

The parties left to law, and a Demurrer allowed from the inconvenience of enforcing such a Covenant by Injunction (a).

THE Bill stated, that the Bishop of Winchester, for the time being, is lord of the manor of Alverstoke and Gosport; and in 1695 the then Bishop granted a lease for lives to Thomas Lewis, of a piece of waste ground and pond, and springs running therein, at Forton, near Gosport; in order to erect water-works; with liberty to lay pipes, through any of the lanes, streets, highways, commons and waste grounds, leading from thence to and through Forton and Gosport, &c.; and to erect cisterns and other conveniences upon the beach for the better and more effectually supplying the inhabitants of Gosport, and his Majesty's Navy and other ships, with fresh water; and that in the said lease there was a covenant on the part of the Bishop and his successors, for a perpetual renewal thereof.

The Bill farther stated, that Lewis afterwards built water-works upon the said waste; and erected cisterns and other conveniences upon the beach of Gosport, for the better and more effectually supplying the inhabitants of Gosport, and his Majesty's Navy, and other ships, with fresh water; and laid out 2000*l.*; and the works at length became vested in Charles Childe; who was also seised of a freehold messuage, and premises, and a well in front of the same; and he devised the water-works with his freehold premises, (including the said well,) to trustees, in trust to sell; who accordingly by indentures of lease and release, dated the 23d and 24th of July, 1792, conveyed to the use of George M'Kinley, and his [\* 455] heirs, the freehold premises with the well; and \*in the said indenture of release was contained a covenant, whereby M'Kinley, for himself, his heirs and assigns, covenanted with the devisees in trust of the water-works not to sell or dispose of the water from the said well to any persons or person whomsoever, to the injury of the Proprietors of the said water-works, their heirs, executors, administrators, and assigns.

By indentures of lease and release, dated the 2d and 3d of March, 1797, M'Kinley conveyed to the use of William Hollis; who devis-

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(a) Courts of Equity interfere in many cases, to restrain a breach of covenant; as where a tenant is carrying off a farm, manure, &c. he had covenanted to consume upon it; but where a covenant is of such a description, that a breach of it can only be ascertained, in each instance, by a trial, the Court will not interfere. 1 Madd. Ch. Pr. 162.

ed the premises with the well to his daughter, her heirs and assigns; and by several conveyances the said premises and well became in 1807 vested in the Defendant, as owner; and he now occupies the same; and the title-deeds, relating thereto, amongst which is the indenture of 1792, are in his custody or power.

The Bill farther stated, that by indentures of lease and release, dated the 2d and 3d of April, 1794, the water-works were conveyed by the devisees in trust of Charles Childe, to the use of the Plaintiff Collins, and his heirs, in trust for the other Plaintiffs, their heirs and assigns.

By indentures of lease, dated the 8th of June, 1807, the Bishop of Winchester granted to Collins a new lease of the water-works at Forton, near Gosport, for the purpose of supplying the inhabitants of Gosport, &c. with fresh water; to hold to Collins, his heirs and assigns, for lives; and Collins declared himself a trustee for the other Plaintiffs.

The Bill then stated, that, before the Plaintiffs entered into possession of the water-works, pipes had been laid for conveying \*water into cisterns in houses in Gosport; and [\* 456] large cisterns had been made in the town for conveying water to houses, which had no private cisterns, at the expense of the proprietors of the water-works; and the Plaintiffs expended considerable sums in repairing and improving the said water-works for the convenience of the town of Gosport, and his Majesty's ships, and other vessels, in order to furnish them with a constant supply of fresh water; and that the said water-works are sufficient for that purpose; and the Plaintiffs have supplied the inhabitants of Gosport, and his Majesty's Navy, and other ships and vessels, with water; and have exercised and enjoyed the same privileges, advantages, and emoluments, from the water-works, as Childe, and his predecessors, proprietors of the same, exercised and enjoyed, until they were interrupted by the Defendant: that in 1807; and soon after the Defendant became seised of the said premises and well, he by means of water-carts and horses, has supplied divers inhabitants of Gosport with water from the well; and has sold and disposed of water from the said well to the great prejudice and injury of the Plaintiffs, who are proprietors of the water-works, and in violation of the covenant in the indenture of 1792.

The Bill therefore, charging, that the Defendant has no right to sell or dispose of the water of the said well to the injury of the Proprietors of the water-works, and that he is not a purchaser of the said premises and well for valuable consideration without notice of the said covenant, prayed an account of the profits, made by the sale of water from the well; and an injunction, restraining the Defendant from selling and disposing of the water of the well to the inhabitants of Gosport, and to his Majesty's ships and vessels, and other ships and vessels, and in any manner, to the prejudice and injury \*of the Plaintiffs, as the Proprietors of the said water-works.

To this Bill the Defendant put in a general Demurrer.

Mr. *Leach* and Mr. *Phillimore*, in support of the Demurrer.

The first question is, whether the assignees of these water-works are entitled to the benefit of M'Kinley's covenant. Considering this as a demise of land, and that these parties claimed as assignees of the reversion, the principle, long settled by *Spencer's Case* (1), applies equally to the assignees of the lessor and the lessee: if, as the covenant does not run with the land, the one is not bound, neither is the other entitled to the benefit of the covenant. This covenant, with the devisees in trust, personally, not naming the assigns, in effect that the premises, conveyed to M'Kinley, shall be used so as not to produce injury to other interests of the grantor, in other lands, interests altogether distinct from that, with reference to which this covenant was entered into, is perfectly collateral. It comes precisely to the case, put by Lord Coke; that, although the covenant be for him and his assigns, yet, if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged; as if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee; because it is merely collateral; and in no manner touches or concerns the thing that was demised, or that is assigned over; and [\* 458] therefore in such case the \*assignee of the thing demised cannot be charged with it no more than any other stranger.

In the case of *The Mayor of Congleton v. Pattison* (2) a covenant, in effect, to make use of the thing granted for the benefit of other property of the grantor, was held to be merely collateral; and therefore not binding the assigns, though expressly named.

Another objection is, that this covenant against acts, that would be injurious to the Proprietors of the water-works, their heirs, executors, administrators, and assigns, must be understood to apply to persons, having the interest, which the original Proprietors had: but it appears by the Bill, that the Plaintiffs are not now the Proprietors of the lease, which the devisees of Childe had at the time of the grant to M'Kinley.

The covenant is liable to be impeached as not capable of being supported in law. A covenant, to secure a monopoly, counteracting the bounty of nature, is void; as against the policy of the law; and, if it could be enforced at law, that is the proper jurisdiction, in an action for damages; and no ground is laid for transferring it to this Court; though they might have come for a discovery in aid of an action. In *Whitchurch v. Hide* (3) the Court refused to interpose upon the claim of the City of London to the exclusive right of supplying the Borough of Southwark with water, on account of the inconvenience.

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(1) 5 Co. 16.

(2) 10 East, 130.

(3) 2 Atk. 391.

Sir *Samuel Romilly* and Mr. *Hart*, for the Plaintiffs.—The circumstance, that this covenant is with the devisees merely, not with them, their heirs and assigns, forms no objection: the devisees \* at the time of making the conveyance, being then: [\* 459] Proprietors of these water-works, stipulating with the party, to whom they conveyed, that the property, so conveyed, should not be used in a way, that would be injurious to the other property, of which they were also trustees. With regard to the objection, that this is not a covenant, that runs with the land, and therefore cannot be considered as in favor of the assigns of the grantor, how is it collateral to the property, to be enjoyed? It is a covenant respecting the mode, in which the property granted shall be enjoyed. It is not easy to apply the cases cited. *Spencer's* case was the case of a wall, not in existence, but to be erected. This rather resembles *Bally v. Wells* (1).

The objection to the jurisdiction would lie equally in the case of a tenant, carrying off the farm manure, &c. which he had covenanted to consume upon it: but the habit of the Court is to grant an Injunction in such a case; upon the principle, that each party is in conscience bound to perform the contract *in specie*.

The Lord CHANCELLOR [ELDON].—This Court will interfere in many cases to restrain a breach of covenant: but I never met with such a covenant as this; upon which I must try in each instance, whether the act of selling the specified quantity of water is a prejudice to the Proprietors of these water-works. I cannot imagine, what jurisdiction a Court of Equity can have upon such a covenant.

\* 1810, April 3. The Lord CHANCELLOR.—In this case [\* 460] the grantors do not except out of their grant of a freehold estate this well: but they take from the grantee of this fee-simple estate a covenant for himself, his heirs and assigns, not to sell or dispose of the water from the said well to the injury of the Proprietors of the said water-works, their heirs, executors, administrators, and assigns. The questions are, first, whether this is a covenant, running with the land: secondly, whether the assignees, if named, can have the benefit of it: thirdly, whether this covenant, if it did run with the land, would not be destroyed by every new lease. A fourth objection, open to much argument, is, whether, with reference to motives of public policy a Court of Equity would act upon such a covenant. Upon another ground, however, it is impossible. From the breach of a covenant, for instance, not to carry on a particular trade within five miles of London, the law implies some damage and injury to the party; and without an estimate the Jury necessarily give some damages. This, however, is a covenant, not against selling the water of this well, but against selling it to the injury of the Proprietors of these water-works; and, those words being infused into the covenant, the Plaintiffs at Law must prove, not only, that the covenant is broken, but that it is broken in a sense, that can be

represented as injurious. Many cases may be supposed, in which the water might be sold without any injury to them; and it is accordingly contended, that the Injunction, which is the object, ought to go, not to prevent their selling water to the inhabitants of Gosport and Portsmouth, or the navy, but to prevent their doing so to the injury of the Plaintiffs' water-works. Observe the situation of the Defendant. Upon every application to commit for breach of the Injunction, the only mode of giving effect to the Decree, a trial must

\* in each instance be directed, to ascertain, whether that [\* 461] act, which might be done without injury to the Plaintiffs, has been done without injury: suppose two ships, touching

at Portsmouth, in want of water: the one going to Sheerness: the other to the West Indies: the latter must pay, whatever might be the demand: the other would take no more than was necessary: and if in that instance two or three casks were sold, could that be represented as a prejudice to the Plaintiffs; to whom they might not have resorted, if the Defendant had refused the supply?

In a case of so great inconvenience, therefore, the Plaintiffs not being able to enforce the Injunction, the only real object, without a trial upon every act, and not having thought proper to reserve this well, but resting upon this covenant, there is the covenant; and they must make what they can of it.

The Demurrer was allowed. \_\_\_\_\_

A COVENANT between a lessor and a lessee, for themselves and their assigns, to do any matter which concerns the lands demised, falls within the rule laid down in *Spencer's case*, 5 Rep. 17, and in *Bally v. Wells*, 3 Wils. 26, 29, 32; S. C. Wilmot's notes, 344, 345, 349, as well as in *The Mayor of Congleton v. Pattison*, 10 East, 135, and must be considered as a covenant that runs with the land. The respective assignees of the parties, therefore, will have the benefit of, and be bound by, all such covenants: *Vernon v. Smith*, 5 Barn. & Ald. 7, 11; and see the *Anonymous case*, Moor, 159, pl. 300. But the interference of equity in such cases is discretionary, though a court of equity has, no doubt, the power to restrain and enjoin, for the very purpose of preventing the necessity of resorting to an action of covenant; but this jurisdiction will only be exercised upon just occasions, and to prevent wanton or fraudulent vexation: *Waters v. Taylor*, 2 Ves. & Beat. 302.

## COCKERELL v. BARBER

[1810, APRIL 4.]

LEGACY in a foreign country and coin, as *Sicca Rupees* by a Will in India : if paid by remittance to this Country, the payment must be according to the current value of the Rupee in India without regard to the exchange or the expense of remittance : So as to other Countries (a).

IN this cause exceptions were taken to the Master's Report ; stating, that a legacy of 30,000 sicca rupees, given by the Will of Charles Barber, at 2s. 6d. *per* sicca rupee, being the East India Company's rate of \* exchange between India and Great Brit- [\* 462] ain at the time the said legacy became payable, amounting in sterling money to the sum of 3700*l.* ; whereas the Master ought to have computed such legacy at 2s. 1d. sterling *per* sicca rupee ; being the sterling value of the sicca rupee in India and England ; and that the same amounted in sterling money to the sum of 3125*l.* only : or at all events the Master ought not to have computed such legacy at more than 2s. 3d. *per* sicca rupee : being the East India Company's rate of exchange between Great Britain and India ; at which rate the same would amount in sterling money to 3375*l.* Exceptions were taken upon the same ground as to other legacies.

Another objection to the Report was upon the calculation of interest upon the whole sum, remitted from India by the Company's bills ; including interest from the end of a year after the testator's death.

The Will was made at Calcutta. The testator, soon afterwards embarking for Europe, arrived in England in July 1799, and died in

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(a) This case is approved by Mr. Justice Story ; Story, Conf. of Laws, § 313. The language of the Court seems to put it upon the ground, that the value, at the par of exchange (not indeed the nominal, but the real par), without any reference to the place of payment, or of remittance, is in all cases, the true rule. It admits, however, of some doubt, whether the Court intended to make so general an application of its language, and did not intend to restrain it to the circumstances of the particular case. Suppose the executor in India had remitted all the funds to England, and had become domiciled there, and the legatee had always lived in India ; would not the latter, having no other means of getting payment but by a suit in England, have been entitled to the charge of remittance to India ? Some of the late cases are at variance with this decision, if it is to be deemed to assert a doctrine of universal application ; *ib.* See *Scott v. Bevan*, 2 B. & Adolph. 78 ; *Delegal v. Naylor*, 7 Bing. 460.

Where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country, to recover for a breach of the contract, a question often arises, as to the manner, in which the debt is to be ascertained ; whether at the established par value of the currencies of the two countries, or according to the rate of exchange at the particular time existing between them. Story, Conf. of Laws, § 308-313. According to some cases the value is determined by the par of exchange ; *Martin v. Franklin*, 4 Johns. 124 ; *Scotfield v. Day*, 20 Johns. 102 ; *Adams v. Cordis*, 8 Pick. 260. According to other cases the value is determined by the rate of exchange. *Smith v. Shaw*, 2 Wash. Cir. 167 ; *Grant v. Healey*, 3 Sumner, 523 ; *Lee v. Wilcocks*, 5 S. & R. 48 ; *Scott v. Bevan*, 2 B. & Adolph. 78 ; *Delegal v. Naylor*, 7 Bing. 460.



August following; leaving personal property both in England and India.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Wilson*, and Mr. *Wingfield*, in support of the Exceptions.—The Master's Report, calculating interest upon the gross sum remitted, composed of principal and interest, is clearly erroneous: but farther the whole principle, upon which the Report proceeds, is founded in error. This legacy ought to be computed according to the actual value in London of the sicca rupee, in silver; which is a coin, not nominal, but actually existing; and therefore the legacy might be paid in London in silver. The actual value of the rupee in London is no more than 2*s.* 1*d.* The mode of remittance from India to London \* is by bills; including the [\* 463] interest between the receipt of the consideration in India and the moment of payment in London, by the person, upon whom the bill is drawn; which is from necessity added to what properly is called exchange; viz. the balance of demand, existing mutually between the two countries. The true subject of consideration, is the actual value of the rupee in London: or, if the rate of exchange is to be taken into consideration, it ought to be the rate between England and India, not between India and England; viz. 2*s.* 3*d.* instead of 2*s.* 6*d.*

The determination of questions of this sort depends upon the domicile of the testator; which in this instance was India: and the payment must be regulated by the established value in the country where it is to be received. The legatee by this mode of computation gets beyond the bounty intended for him, an excess, composed of interest and the rate of exchange, which is continually fluctuating; according to *Wallis v. Brightwell* (1); followed by *Saunders v. Drake* (2), and other cases, collected by Mr. Roper (3), upon legacies in Ireland, or the West Indies. Payment in the actual coin, whether rupees or dollars, would have been good: the legatee not having an option to be paid in the nominal value of pounds sterling, which would give a different amount. Great uncertainty will be the consequence of taking the rate of exchange, which cannot afford a fixed rule, or any other medium than the intrinsic value of the bullion. The inquiry here can only be, what is the sterling value, to be computed according to the rate of money in Ireland, [\* 464] India, &c. In the case of \* *Cash v. Kennion* (4) your Lordship held, that a party, under an obligation to pay money in the West Indies, might make the payment there; and though the creditor might wish to have it here, that is between him and his agent.

Mr. *Leach*, for the Report.—The testator, expressing the legacy by the current coin of the country, must be taken to mean the value

(1) 2 P. Will. 88.

(2) 2 Atk. 465.

(3) Roper, on Legacies.

(4) *Ante*, vol. xi. 314.

it bears in that country : not the bullion value ; but that, which the country has imposed upon that coin. If the legatee is to be paid in India, he has a right to Indian interest until he is paid. The true standard ought to be, that neither the legatee, nor the testator's estate, should derive profit from the circumstance of the payment's taking place in London ; that the effect shall be precisely the same, as if it had been made in India.

The objection upon the computation of interest must be admitted : the legatees having in the mode of payment by the Company's bills the benefit of interest for the year from the period, when their right to interest accrued.

Sir *Samuel Romilly*, in reply.—If the fund, which is to pay a legacy to a foreigner, is in this country, and he files a Bill, the value of his interest cannot depend on the rate of exchange between this country and that, of which the legatee is a native ; as it must necessarily, if the legacy is to be paid in a foreign country. In the case, put by the Court, of a legacy of so many ounces of silver, the executor must purchase that quantity according to the price of silver at the time. The difference of exchange must be laid out of the question.

\*The Lord CHANCELLOR [ELDON].—In all the cases [\*465] reported upon the Wills of persons, in Ireland, or Jamaica, and dying there, (and *vice versa* in this country) some legacies being expressed in money sterling, others in sums without reference to the nature of the coin in which they are to be paid, the legacies are directed here to be computed according to the value of the currency of the country to which the testator belonged, or where the property was ; and I apprehend, no more was done in such cases than ascertaining the value of so many pounds in the current coin of the country ; and paying that amount out of the funds in Court. On the other hand I do not believe, the Court have ever said, they would not look at the value of the current coin ; but would take it as bullion. At the time of Wood's halfpence in Ireland, whatever was their actual worth, yet payment in England must have been according to their nominal current value, not the actual value. So, whatever was the current value of the rupee at the time, when this legacy ought to be paid, is the ratio, according to which payment must be made here in pounds sterling. If twelve of Wood's halfpence were worth sixpence, in this Court sixpence must have been the sum paid ; and in a payment in this Court, the cost of remittance has nothing to do with it ; so, if the value of 30,000 rupees at the time the payment ought to have been made in India was 10,000*l.*, that is the sum to be paid here, without any consideration as to the expense of remittance.

With regard to the interest, it is given both ways ; as, if the legacy was paid at the end of the year in India by a bill payable in London at the end of another year, that includes interest for the current year.

Refer it back to the Master to review his Report in that respect ; and declare, that the legacies are to be paid according to the current value of the sicca rupee in Calcutta.

SEE notes 2, 3, to *Raymond v. Brodbelt*, 5 V. 199.

## DE MINCKWITZ v. UDNEY.

[1810, APRIL 5.]

PLEA to a Bill, for specific performance of an agreement for a lease to the Plaintiff, and an Injunction against an Ejectment, &c. that the Defendant had since the Bill filed taken the benefit of an Insolvent Act, over-ruled.

THE Bill, filed before July 1809, stated an agreement in writing, dated the 20th of September, 1808, that Ann Udney is to grant a lease for the term of ten years of two houses in Harp Court, Fleet Street, for the sum of 1000*l.* ; that the lease shall after the execution be left in the hands of Ann Udney ; and a warrant of attorney shall be given for securing the payment of the above sum ; to be paid by instalments of ten guineas a week, till the above sum should be paid : then the warrant of attorney and the lease to be given up ; and the house to be rented at the sum of 80*l.*, to be paid weekly : the fixtures to be taken at a valuation to be paid immediately : the lease and warrant of attorney to be signed by both Plaintiffs (husband and wife) jointly and separately ; either party, deviating from the agreement, to forfeit 3000*l.* : all fines and the expense of the deeds to be paid by the Plaintiffs : the lease to contain the usual covenants : the Plaintiffs to keep the houses in tenantable repair ; and not to dispose of or assign the lease without consent from Ann Udney, her heirs, executors, administrators, and assigns, or some of them, until the 1000*l.* should be paid.

The Bill then, suggesting, that the premises were very [\* 467] decayed, and that the Plaintiffs expended upwards \* of 400*l.* in repairs, having taken possession, relying upon the assurances of the Defendant, charged, that the Defendant has not at present a good title ; and cannot grant a valid lease ; that the title to the inheritance, and the deeds, &c. are in some other person ; but the Defendant can obtain from such person a title ; and enable herself to grant a lease ; and, the Plaintiffs refusing, until she could do so, to pay any farther part of the consideration, the Defendant took out judgment and execution against their effects ; and brought an ejectment.

The Bill prayed a specific performance of the agreement ; offering to pay the money due, and to become due, under the agreement ; if it shall appear, that the Defendant is not able to grant, or procure to be granted, to the Plaintiffs, a good lease, pursuant to the agree-

ment, that an account may be taken of the loss, injury, and damage, which the Plaintiffs have sustained, and shall sustain by the Defendant's not having performed, and not being able to perform, said agreement; and that she may be decreed to pay to the Plaintiffs the amount of such loss, injury, and damage, &c.

To this Bill the Defendant pleaded, that by an Act of Parliament 49th Geo. III. for the relief of certain insolvent debtors it is enacted, that every person, who on the 1st of February, 1809, was charged in prison for any debts, &c. which did not in the whole amount to a greater sum than 2000*l.*, should be discharged according to the provisions of the Act; and that all the estate, right, title, interest, and trust, of such debtor in real and personal estate should be vested in the Clerk of the Peace: with an averment, that previously to the 1st of February, 1809, the Plaintiff Hans De Minckwitz was a prisoner for debt in the Fleet Prison, for debts not amounting to 2000*l.*; and was discharged under the Act on the 27th of \* July, 1809; and thereby all his real and [\* 468] personal estate became vested in the Clerk of the Peace; and still remains in him; and the Defendant pleads the Act in bar.

Mr. *Johnson*, in support of the Plea, observing, that it would be very difficult for the assignees to claim a lease under a contract, so extraordinary, contended, that the right of the Plaintiff, the husband, being completely transferred to another person by the Act of Parliament, the Plaintiff could no longer sustain the suit; according to the case (1) of a bankrupt, put by Lord Redesdale; and the circumstance, that this Plaintiff had not, when the Bill was filed, taken the benefit of the Act, though he was then in the custody of the Warden of the Fleet, makes no difference: the Defendant being exposed to all the mischief of answering the Bill of a person, who has become incompetent to support the suit; unless protected by pleading, that the person, thus forcing her on, has no longer any interest to maintain.

Mr. *William Agar*, for the Plaintiffs, having mentioned the case of *Williams v. Kinder* (2) was stopped by the Court.

The Lord CHANCELLOR [ELDON] said, the Defendant could not get over the fact, that these circumstances did not exist, when the Bill was filed; and the consequence is, that the assignee under the Act, Clerk of the Peace, or assignee, must come in by a supplemental suit.

The Plea was accordingly over-ruled.

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SEE, *ante*, the notes to *S. C.*, 16 V. 356.

(1) Mitf. 189.

(2) *Ante*, vol. iv. 387; see the note.

## CODRINGTON v. PARKER.

[1810, MARCH 22; APRIL 10.]

RECEIVER upon a mortgagee in possession; who cannot ascertain the debt, due to him.

A MOTION was made by the Plaintiff, a second mortgagee of an estate in the West Indies, of which the Defendant was the first mortgagee, in possession, for the appointment of a Receiver and Manager.

Sir *Samuel Romilly*, Mr. *Hart* and Mr. *Daniel*, in support of the Motion: Mr. *Leach*, for the Defendant.

The Lord CHANCELLOR [ELDON].—The Court had not in any instance, that I recollect, put a receiver upon a mortgagee in possession; provided he would swear, that any thing was due to him; but the question here, upon which I shall pause, before I form a precedent, is, whether a case may not arise, even of mere negligence in keeping his accounts, so that neither he, nor a subsequent incumbrancer, nor the owner of the estate, can ascertain, what is due, sufficient to furnish a principle, upon which the Court would say, that nothing was due. In this instance those accounts, which according to the law of the island ought to have been passed, were not passed: no account was passed, since the Bill filed, in 1803; until, long after the Decree, which was in March 1808, accounts were produced to the year 1802. If a mortgagee in possession cannot find the means of enabling the Court to pass his accounts, so that a subsequent incumbrancer cannot know, what he is to pay, I am not sure, that the Court would not hold, that nothing was due to him. The single question now is, whether any thing is due, with reference to which the mortgagee has a right to retain [\*470] the possession. The manager in the \*island must know, and the subsequent incumbrancer and the mortgagor are entitled to know, what is the state of the account; and, the consignees here having sent over their accounts in 1808 or 1809, why did not the manager state the accounts and the balance? I have very little doubt, except whether I should appoint a Receiver at present, or give time to answer that question.

*April 10th*, 1810. The Lord CHANCELLOR permitted the Motion to stand over; in order that an affidavit should be made as to the sum due to the Defendant; declaring, that if that information should not be given, the Order for a Receiver should be made (1).

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SEE note 2 to *Quarrel v. Beckford*, 13 V. 377.

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(1) 15 Vin. 467, pl. 15: *Barney v. Sewell*, 1 Jac. & Walk. 647.

## JONES v. ALEPHSIN.

[1810, APRIL 10.]

WRIT of *Ne exeat Regno* upon the concurrent jurisdiction, in Account: though Bail might be had at law (a).

Against a positive Affidavit the Defendant's Affidavit, or Evidence of the Plaintiff's admission, that no debt is due, will not avail.

The Affidavit of a threat or intention to go abroad must be positive; not upon information and belief.

A MOTION was made to discharge a writ of *Ne exeat Regno*; upon the grounds, first, that the Plaintiff had a proceeding by action at law against the Defendant, an administrator: secondly, evidence of an admission by the Plaintiff, that no debt was due to him: thirdly, that the affidavit, representing the Defendant as a Frenchman, resident in France, who came over to this Country merely for the purpose of obtaining the property, meaning to return immediately to France, was only upon information and belief; the Defendant swearing, that he is a settled subject, meaning to reside in this Country.

Mr. Leach and Mr. Toller, in support of the Motion, upon \* the third point referred to the case of *Etches v. Lance* (1). [\*471]

Sir Samuel Romilly and Mr. Owen, for the Plaintiff, observing, that from necessity the debt, for business done as an Attorney, is not for this purpose liable to the objection that the Bill had not been delivered under the Act of Parliament (2), contended, that the result of the affidavits was no denial, that the Defendant was an alien enemy; and a strong case of information and belief by the Plaintiff and declarations by the Defendant; and the instance, sworn to, of an admission by the Plaintiff on one occasion, that nothing was due to him, cannot prevail against his oath.

The Lord CHANCELLOR [ELDON].—It is settled, that, though a Plaintiff, swearing to the balance of an account, may have bail at law, yet this Court holding a concurrent jurisdiction upon the head of account, he may have the writ; and, where a creditor files a Bill for an account, and administration of the assets, if there is a clear affidavit of assets received, this Court will grant the writ. I recollect particularly one case; in which I had much argument in Court, and conversation with Lord Thurlow, as to the sum in which the writ ought to be marked. With regard to the debt it is clear, that against a positive affidavit the Defendant's oath or the Plaintiff's admission will not prevail.

(a) For the recent authorities showing resort to writs of *Ne exeat* in the United States, see *ante*, note (a) *De Carriere v. De Calonne*, 4 V. 577; note (a) *Coglar v. Coglar*, 1 V. 94; note (a) *Russell v. Ashby*, 5 V. 96, note (a), 98.

(1) *Ante*, vol. vii. 417; *Hannay v. M'Entire*, xi. 54; see the notes, i. 95; iv. 592; and Mr. Beames's *Ne exeat Regno*.

(2) For the same reason such a debt will support a Commission of Bankruptcy: *ante*, vol. xv. 489; *Ex parte Sutton*, xi. 163.

Though the affidavit as to the intention to go abroad struck me at first as a positive affidavit, upon farther consideration I [\*472] \*take it not to have been so intended; but that information and belief ran through the whole; and it has been long settled, with regard to this high prerogative writ, that it is not sufficient to state information and belief, that the Defendant has threatened, or means, to go abroad; but without a positive affidavit or a threat or purpose of going abroad, this writ cannot issue.

This writ therefore has issued improvidently; and must be quashed.

As to the general doctrine with respect to writs of *ne exeat*, see, *ante*, the notes to *De Carriere v. De Calonne*, 4 V. 577; and, with reference to the principal case, particularly notes 1, 2, 6.

LEES, }  
POULDEN, } *Ex parte*.

[1810, APRIL 18.]

✓ DISCRETION of the Great Seal to supersede a second Commission against an uncertificated bankrupt, and even, under circumstances on the Petition of the bankrupt, or not.

The Petition for that purpose of the petitioning creditor under the first Commission dismissed with Costs, under the circumstances; fifteen years since the first Commission; during the last seven of which the bankrupt, who was his son-in-law, was permitted to carry on trade in another place.

Inconsistency of the decisions, that a bankrupt, uncertificated, has no property; yet may acquire it by Action, [p. 474.]

Circumstances under which a bankrupt uncertificated might petition to supersede a second Commission against him, [p. 474.]

As to the distinction, that an objection, which a third person may take, cannot be taken by the bankrupt, *Quære*; especially, with reference to criminal cases, [p. 476.]

THE prayer of these Petitions was, that a Commission of Bankruptcy, which issued in January, 1810, against the petitioner Poulden, may be superseded: the Petitioner having been declared a bankrupt under a Commission, which issued against him in 1795; and not having obtained his certificate. The other Petitioner Lees, who was the father-in-law of the bankrupt, was the petitioning creditor in that Commission.

Mr. Leach, and Mr. Montague, in support of the Petitions.—A second Commission of Bankruptcy, pending the former Commission, could not possibly be maintained at law. [\*473] \*Upon proof of the first Commission, and assignees existing under it, the assignees under the second must be nonsuited. Yet, though the subsequent Commission is void at Law, a case may be made, upon which your Lordship would refuse to interfere; and the question is, whether these facts raise that case. In *Ex parte Proud-*

*foot* (1) the circumstances amount to direct evidence of assent by the creditors under the first Commission; a clear waiver of their right; which without doubt they may waive. This is not the case of a mere application by the bankrupt himself. The principle is, that an uncertificated bankrupt has against all the world, except his assignees under the first Commission, a special property, enabling him to give a competent title. In that respect, *Ex parte Rhodes* (2) and other cases of that class, have no application; and upon *Ex parte Bold* (3) it is not enough, that a subsequent trade was carried on, of which the first assignees could not be ignorant: that simple fact not amounting to a waiver of their right. The circumstances of this case afford some suspicion, but no evidence of an agreement, that will amount to a waiver. During the last seven years the bankrupt did not reside near the petitioning creditor or the assignees under the first Commission; and in that period all the subsequent debts accrued.

Mr. *William Agar*, for the Assignees under the second Commission, contended upon *Ex parte Rhodes*, where the second Commission was supported, that all these cases depend upon expedience; as, if there are no effects to be administered under the second Commission.

\*The Lord CHANCELLOR [ELDON].—This case came on [\* 474] first upon the Petition of the bankrupt; stating these circumstances; that in 1795 a Commission of Bankruptcy issued against him; under which he had not obtained his Certificate; that on the 15th of January last another Commission issued against him at the instance of a creditor at Manchester; and praying, that the latter Commission may be superseded.

As to the general question, the decisions, that a bankrupt uncertificated, has no property, and, that he may acquire property by Action, are not to be reconciled; both are however settled points, which cannot be disturbed.

I will not upon this occasion lay down, as general doctrine, without any exception, that the bankrupt himself cannot petition to supersede the second Commission. That may not be improper under circumstances (4): if, for instance, a creditor, who might have proved under the first, was the petitioning creditor under the second, the bankrupt would be entitled to protection. I can also conceive, that the bankrupt might desire, that the second Commission should be superseded, if it was taken out under circumstances, making it not expedient, that it should remain ostensibly in force, if void at Law; though the conduct of all the parties under the first Commission brought nothing forward, that could be the foundation of an objection against the bankrupt, the assignees, or the petitioning creditor under that Commission. Farther, I am not sure, that a case might not be

(1) 1 Atk. 252; see *Ex parte Crew*, ante, 236.

(2) *Ante*, vol. xv. 539; *Ex parte Martin*, xv. 114; *Ex parte Brown*, ii. 67, and the note, 69.

(3) 1 Cooke's Bank. Law, 9; 8th ed. 14.

(4) See *Ex parte Crew*, ante, 236.



made, in which the bankrupt might be heard for this purpose : but if he applies upon this principle of law, that all his property is [\* 475] \* vested in the assignees under the first Commission, he might be desired to bring all his property into Court; that the equities between the two classes of creditors might be settled. I did not however supersede the second Commission upon the bankrupt's application.

Then, as to the other Petition, it is presented by the petitioning creditor under the first Commission; which issued fifteen years ago; and, admitting, that inference is not to be strained, the inference, that he might, and must, have had some knowledge of the transactions of the bankrupt during the last fifteen years, is not too strong: the bankrupt, his son-in-law, carrying on trade during those fifteen years; the last seven in London; the former period probably in Manchester: Lees aware, these persons, whose property, exceeding 6000*l.*, he obtained, ignorant that he was an uncertificated bankrupt.

It has been said correctly, that, though the second Commission is void at Law, the Court does not therefore supersede the Commission; that it has frequently refused; admitting the Commission to be void at Law: the party standing in circumstances, under which he could not be heard for that purpose: as in many cases it might be fit to leave those, who claimed under the Commission, to attempt to maintain it at Law; and, if the first Commission had been kept on foot fifteen years, with the view of protecting the bankrupt, and enabling him to defraud all those, with whom he might deal in subsequent transactions, I should rather supersede the first Commission, at the instance of the assignees under the second, than the second at the instance of the assignees under the first.

It is not to be inferred therefore, that, as the Commission cannot be maintained at Law, therefore it is to be superseded here. [\* 476] I could never conceive, how Lord Hardwicke \* could, as he did in fact, support both a joint and a separate Commission, if the mere fact, that a second Commission is void at Law, furnished the guide of his practice. We have now a mode of arrangement, attended with less oppression and expense; but certainly the practice was different at that time. It has been said lately at Law, and frequently here, that third persons may take an objection, which the bankrupt himself cannot take (1). How far that is free from objection, I do not know. It has occurred to me, that there are very weighty and powerful objections to that doctrine; which have been thought so considerable in criminal cases, that the bankrupt has been permitted to enter into it.

It is then observed, and justly, that the effect of superseding the second Commission, permitting the first to stand, is a great hardship upon subsequent creditors; as they cannot prove under the first Commission. It is said, they are to work out their equity; and in

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(1) See *Bullock's Case*, *ante*, vol. xiv. 452; 1 Taunt. 71.

*Ex parte Bold* (1) I as Counsel, contended, that this equity, according to the case of *Troughton v. Gitley* (2) is the subject, not of a Commission of Bankruptcy; but by some bill the bankrupt is to be considered as the agent of creditors, having a demand upon the property acquired; to be satisfied, before the assignees under the first Commission can take any thing; upon an obvious principle of natural equity; as the property, obtained in the trade, is only what shall remain, after the debts of that trade have been paid. The effect however in this jurisdiction, which is both legal and equitable, is very different from the effect at Law, where the second Commission would be void; and the equity could not be administered. In *Ex parte Proudfoot* (3) \* the mere circumstance [\* 477] of the assent, though it might operate as an estoppel, to prevent their coming here, could not make good the second Commission, if void at law, and the certificate under it.

Upon the circumstances of this case my conviction is, that the petition of Lees, is the petition of the bankrupt: Lees, his father-in-law, applying at the distance of fifteen years; with the knowledge, that he was an uncertificated bankrupt, permitting him for seven years to hold himself out in London as a person, who might be safely dealt with; and, when he avows, that he has not the means or the intention of paying them, enabling him to set them at defiance; and threatening, that he will supersede the Commission. My opinion is, that this cannot be permitted; and upon the particular circumstances of this case, in which I lay down no general doctrine, but that it is in the discretion of the Great Seal, whether the second Commission shall be superseded, or not, I dismiss this petition with costs against Lees.

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SEE notes 2, 5, to *Ex parte Brown*, 2 V. 67.

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(1) 11 Cooke's Bank. Law, 9; 8th ed. 14.

(2) Amb. 630.

(3) 1 Atk. 252.

## LORD SHIPBROOK v. LORD HINCHINBROOK.

[1810, MAY 3, 4.]

EXECUTORS and trustees charged for negligence by joining in a transfer to a co-executor upon his groundless representation, that it was required for debts: but not, liable so far as they can prove the application to that purpose; though he possessed other funds, not through them; which funds he wasted (a).

As to the cases, breaking down, the distinction between Executors and Trustees joining in an act, by which one obtains and misapplies the fund, that Executors are all liable, Trustees not, as the former need not, and the latter must, join, *Quere* (b), [p. 479.]

THIS cause came on upon the Master's Report under the inquiry directed (1), whether the fund of 1200*l.* Reduced Bank [\* 478] Annuities, \* with which the Master's Report had charged the Defendants Lord Sandwich, Sir George Osborn, and John Osborn, three of the executors and trustees under the Will of Anna Maria Lumm, having joined in a Power of Attorney to the fourth executor for the sale of the Stock, on his representation, that it was required for debts, was applied in discharge of any and what debts.

Sir *Arthur Piggott*, Mr. *Richards*, Mr. *Hart*, and Mr. *Wear*, for the Plaintiffs.

Sir *Samuel Romilly* and Mr. *William Agar*, for the Defendants, the executors, contended, that it could not be expected, that these executors should go to a great distance in the country, for the purpose of personally paying trifling debts; as many of these were; and they relied upon the case of *Bacon v. Bacon* (2).

The Lord CHANCELLOR [ELDON].—I cannot bring my mind to a doubt upon this point, sufficient to require a reply. The Master charged these executors with the whole fund upon this principle; that their co-executor, being at the time they enabled him to obtain possession of the produce of the stock debtor to the estate in the amount of nearly 3000*l.*, and having in his hands that sum, almost four times the amount of the produce of the Stock, might have applied that balance in his hands to the debts and legacies; and the other fund was therefore placed in his power improperly. Upon my recollection of what passed before; and on looking at the Report of the case I find my recollection accurate, that appeared to me to be

(a) Two executors sold out stock, and the produce was received by one; the other was held responsible for its misapplication, but was entitled to an inquiry, whether any part had been applied in discharge of claims against the testator. *Williams v. Nixon*, 2 Beavan, 472. For other recent authorities in illustration of the liabilities of executors for each other, see *ante*, note (a) *Chambers v. Minchin*, 7 V. 186.

(b) For the distinction between trustees and executors in respect to their liability for the acts of each other, and the reason for that distinction, see 2 Story, Eq. Jur. § 1280, 1280*a*, and the notes: *Mores v. Levi*, 3 Y. & Coll. 359, 367.

(1) See *ante*, the former Report, *Brice v. Stokes*, *Langford v. Gascoyne*, vol. xi. 252, 319, 333; and the note, ii. 679.

(2) *Ante*, vol. v. 331.

a stronger decision against executors than the law of this Court would require: that executor having received the sum, forming \* the balance, due from him separately, without [\* 479] the active co-operation of his co-executors; and if he cannot make good that sum, which he had received, and was answerable for, separately, there is no reason against applying the remaining funds to the debts, not discharged; which funds they might be compelled so to apply.

A considerable question however arises out of the circumstances; whether the other executors, having put in the hands of their co-executor the produce of the remaining fund, can be protected beyond the actual application of it to that object, to which they might have been compelled to apply it: whether they can be discharged with regard to so much as was not, or cannot be, ascertained to have been so applied. Considerable assertion took place at the bar both ways upon the fact, whether they had notice of the balance in the hands of their co-executor; and either party is entitled to the benefit of fair argument, that would arise, according to the fact. I take it upon the Report, that they had not notice; which is perhaps going a considerable way. When this case was formerly before me, there was much discussion upon the principle, as applying to executors and trustees. The old rule, very inflexibly adhered to, was, that, where executors joined in the act, as it was unnecessary, all were answerable: but trustees were not answerable; as it was necessary, that they should join; and perhaps it may be reasonably doubted, whether those decisions, which have broken down a very intelligible rule, leaving every case to be determined upon its own circumstances, are very wise. This case however depends upon the principle, applicable to trustees: the fund, being vested in the names of all the executors, it was necessary, that all \* should join in the [\* 480] act, which placed the property in the possession of one of them; and my mind had reached this conclusion; that, as these executors could not be held answerable for the balance, for which their co-executor was to account separately, they had a right to contend, at least, that they should be allowed so much of the fund as had been applied to the purpose, to which it ought to have been applied; as they might have been compelled so to apply it.

The question therefore arose as to the difference: the proof of the due application being upon the executors; and the circumstances are, that all of them, having proved the Will, proceeded to have the Stock transferred into their own names. During two years and a half from the death of the testatrix, until July 1779, when the transaction, upon which this question arises, took place, this individual had been acting in the executorship; trusted, and very naturally trusted, by the other executors: upon whom no moral blame attaches; but merely that degree of negligence, which is frequently observed in very honorable men. The law, it must not be forgotten, supposes, that something is to be done in a year; and these executors, entrusting their co-executor during the period I have mentioned, ought

at least to have made some inquiry, what had been done in these affairs. If, making that inquiry, they were misled, that is a distinct case : but, making no inquiry, they are satisfied with the information, which proves groundless, that he wants the money for the purpose of paying debts. They ought to have inquired, how that could be ; and though it is not a consequence, that they might not place the remainder of the property in his hands, it must surely be at their risk ; if they were aware, that he had been, not acting, according to his trust, but grossly violating it. This therefore, being the

[\* 481] case of executors, who, making no inquiry \* whatever, permitted their co-executor to do just what he pleased, has no resemblance to *Bacon v. Bacon*, (taking that decision to be right, as to which I give no opinion), or any other case ; and a decision, that executors are not to be charged in such a case, would amount to this ; that executors can in no case be chargeable.

SEE, *ante*, the notes to *S. C.*, 11 V. 252.

## HERBERT v. REID.

[1810, MAY 12, 15.]

LEGACY to A. if in the Testator's service at the time of his decease. Parol evidence admitted to show, that, though she had quitted his house, she continued, and was considered by him as, in his service ; and upon that evidence the legacy was established (a).

Evidence not admissible to alter a Will.

ROBERT BRETCLIFF by his Will, dated the 20th of June, 1806, gave and bequeathed to Jane Herbert, if in his service at the time of his decease, the sum of 500*l.* stock then standing in his name in the 3 per cent. Consolidated Annuities for her own use and benefit ; and he gave all the residue of his estate to Thomas Reid and Edward Rogers ; whom he appointed his executors.

The testator died on the 17th of September following. The Bill was filed by Jane Herbert ; claiming the legacy ; though she was not actually living with the testator at the time of his death ; representing, that, though she quitted the testator's house a few days be-

(a) Parol evidence is admissible to explain latent ambiguities, and to apply an instrument to its subject. 1 Greenl. Ev. § 297, 301 ; see *ante*, note (b) *Baugh v. Read*, 1 V. 257.

According to Mr. Wigram, for the purpose of determining the object of the testator's bounty, or the subjects of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or things intended by the testator, or to determine the quantity of interest he has given by his will. Wigram, on Wills, Proposition V. p. 51.

fore his death by the advice of the Defendant Reid, in pursuance of a plan, formed by the Defendants to deprive her of her legacy, she did not mean to quit, nor was it understood that she thereby quitted his services; but she was, and was considered by the testator as, his servant up to the time of his death. The Bill had various charges, in support of that allegation, of false representations by the Defendants to prevail upon the testator to express himself displeased with the Plaintiff, and to send her from his house; that they advised her to quit the testator's dwelling-house for a short time; \*and assured her, that she should be soon sent for [\* 482] again to the house, and return to her service; that the testator was weak at the time in body and mind; that he intended, that she should have the legacy, &c.

The Defendant Reid by his Answer admitted, that the testator about three months before his death showed the Defendant his Will; and said, his reason for leaving the Plaintiff a legacy was for the purpose of insuring her continuance in his service; as he was then unwell; denying that he (Reid) or the other Defendant formed a plan to deprive the Plaintiff of her legacy by causing her to quit the house; stating that about a fortnight before the testator's death he sent for this Defendant and informed him, that the Plaintiff had used him very ill; and he was determined she should not continue in his services, or in his house; and requested the Defendant to send her away; and, the testator being determined in his intention, the Defendant informed the Plaintiff thereof; and advised her to quit the house peaceably: but he denied, that he made any assurance or intimation to her, that she should return to the house, or to her service.

The Defendant Rogers put in a similar Answer; particularly denying a charge, that he was present at a conversation of the testator with Joseph Dutton; and said, he thought the legacy too much: the Answer stating, that, the Defendant being with the testator and Dutton the day after the Plaintiff had gone, Dutton said, he was sorry Jane was gone; as she had lived in the testator's service many years; and the testator replied, she had behaved ill; and had nobody to blame but herself. Both the Defendants denied, that the testator's faculties were impaired, and the charges of false and fraudulent representations by them to the testator, &c.; and there was no evidence in support of these charges.

\* Joseph Dutton by his depositions stated, that the Plaintiff lived near twelve years with the testator as a servant; that he carried on the business of a dealer in clothes; and she was employed, not only in the household work, but in his trade; of which, when he went into the country, he left the whole conduct to her for above three weeks; and placed confidence in her integrity. The deponent calling on the testator five or six days before his death, the testator, on seeing the deponent said, "What, and you are come to solicit:" the deponent said, "Solicit what, friend?" The testator replied, "Why, Jane is gone." The deponent then

reasoned with him on the propriety of his turning away an old and faithful servant, who had served him many years faithfully; and especially at a time when he stood most in need of her assistance; and whom he had informed the deponent he could always trust with his property; and otherwise spoke extremely favorably as to her general conduct as his servant. The testator said, "I have still a regard for her: I do not owe her the least ill will; for I have left her 500*l.* by my Will; and when I get better in health she is to come home again:" the Defendant Rogers was present; and the deponent observing, that he thought the legacy of 500*l.* a handsome sum for the Plaintiff, Rogers said, "Yes: a considerable deal too much."

William Allan stated, that the testator about five or six days before his death sent for the deponent; who found him attended by Mrs. Morgan and Mr. Tolly; when the testator addressed the deponent thus: "I have sent for you, Mr. Allan, to say in the presence of these women, that, if I never see my executors more," (and putting up his hands) "for God's sake let the girl have her legacy:" the testator having before told the deponent, that he had by his Will  
[\* 484] \* left her 500*l.*; and that was not all he meant to do for her.

Ann Morgan stated, that about a fortnight before the testator's death he sent for Allan; and in the presence of the deponent and Mrs. Tolly, his niece, said, "Mr. Allan, I have sent for you on this occasion; for if I never see my executors more, tell them to let that girl have her 500*l.*" and (putting his hands together) "for God in heaven's sake if I never see Mr. Rogers more, tell him to let Jane have her 500*l.*;" and Allan said, he would. About a fortnight before the death of the testator, and about a week after the Plaintiff had left his house, the deponent and Rogers were with the testator; who desired Rogers to go and desire Reid to come to him; that, while Rogers was absent, the testator observed to the deponent, that he thought of leaving Jane her money weekly, instead of in substance; and asked the deponent, what she thought of it; she replied, she thought he had better leave her a sum in substance; as it would be of more service to her than a few shillings *per* week; if she happened to marry, and meet with a good partner; with which the testator agreed; and then said, he was sorry he had sent for Mr. Reid; for that he would not make any alteration in his Will; and on Reid's leaving the house, after some private conversation with him, the testator informed the deponent, that Reid had promised him, that whatever he said, or wished to be done by word of mouth, should be law, and he would act by it the same as if it was in the Will; and the deponent several times heard Rogers express himself to the testator to the like effect; and several times heard the testator say, that when he got better, the Plaintiff should come back to his service.

By a Decree, pronounced at the Rolls in February 1803,  
[\* 485] \* the right of the Plaintiff to the legacy was established. From that Decree the Defendants appealed.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiff, in support of the Decree.

Mr. *Martin* and Mr. *Cooke*, for the Defendants.—Taking this evidence to have been received to prove, that the testator considered the Plaintiff as not dismissed from his service, which seems to be your Lordship's impression, the effect is most dangerous; being either adding a new term to the Will; "provided I consider her in my service at the time of my death:" or narrowing the legal construction of the words, in which the legacy is given; understanding the condition, if she should be in his service, thus; if he should by mistake so consider her. For neither of these purposes can evidence be admitted. It would introduce all the fraud and perjury, against which the Act of Parliament (1), was directed. The 22d section shows the care, with which the Legislature guarded against any parol alteration of a Will. The legal effect of the contract was at an end by the fact, stated by the Bill, that she had received her wages; and left the testator's house. She could not after that be considered as in his service, for the purpose of gaining a settlement: nor upon these declarations could she have sued for wages in respect of the subsequent period.

The Lord CHANCELLOR [ELDON].—My view of the case is this. Upon all the evidence the intention is clear: but it is impossible to receive any declaration of the testator, going to alter the effect of \*his Will, by entitling her to the legacy; if she [\* 486] is not entitled by the words of the Will; and to that end it must be made out, that she was in the testator's service at the time of his death. The conversation and declarations of the testator may be, not only evidence, and extremely strong, but in many cases the only possible evidence, within reach, of the fact, whether she was, or was not, in his service; especially where, if in his service, she certainly was not in the house; and the fact, that she was not in the house, could be accounted for only by him and her. If it was proposed to prove the fact, whether she was, or was not, in his service, conversation about the legacy, though not admissible to prove, upon what terms it was given, to alter, detract from, or add to, the terms of the Will, might be evidence of the fact, that he conversed upon that legacy, as being due; as it could not be, unless she was in his service; and it was therefore competent to prove the fact, that she was still in his service. If the Bill had stated unequivocally, that she had quitted his service, if that had not been qualified by the statement, that she was still considered as his servant, that would have required a great deal of consideration with reference to the expression in the depositions, that she was to come home again, or to come back to his service; the meaning of which must depend upon the context. The decision I take to have been made upon this ground; that there was evidence from the testator himself, that notwithstanding appearances the Plaintiff was still in his service. There

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(1) Stat. 29 Ch. II. c. 3.



is much evidence in support of that; and much, that deserves consideration on the other side.

*May 15th.* The Lord CHANCELLOR [ELDON].—The Appeal from the Decree in this cause contends, that an erroneous judgment was formed upon the point of \* admitting evidence, proposed to prove the fact, that the Plaintiff was in the testator's service at the time of his death; and farther, that, if in that respect the decree is not to be impeached, the Master of the Rolls, proceeding upon that evidence, as amounting to proof, that she was in his service at the time of his death, made a wrong conclusion; and that, if the Appellants cannot effectually contend, that she was not in his service at his death, yet upon the evidence it is expedient, that the Court should not determine that question of fact in the first instance; but that there should be farther inquiry either before the Master, or a Jury.

The Plaintiff, representing by her Bill what is proved by three witnesses, and to that evidence there is no objection, that she had been the testator's servant about fourteen years, during a considerable part of which time she had the management of his shop-business, particularly in his absence, proceeds to suggest what is neither admitted, nor proved; that she was induced to continue with him by repeated promises to provide for her; and, a short time after the execution of the Will, the testator being seised with the illness, which terminated in his death, the Defendants, particularly Rogers, formed a scheme to deprive her of her legacy by procuring her to quit the testator's residence; and used false representations to induce him to send her from his dwelling-house. That allegation is positively denied by both the Defendants; but I observe upon the passages in their answers, that they have not ventured to swear, that an end was put to the service. The allegation of the Plaintiff is, that she is entitled to the legacy, as being in fact, and considered by the testator, his servant at the time of his death; that she quitted his house at the express solicitation of one of the Defendants; and did not mean, nor was understood, to quit his service. The conversation,

[\* 488] \*detailed by Dutton, is charged to have taken place in the presence of the Defendant Rogers; who has denied that fact; which would be material to support the Plaintiff's claim upon another ground: but it must be laid out of the case.

The Defendants put in separate answers. Reid expressly states, that the testator a short time before his death showed the Defendant his Will; and mentioned the reason of his giving a legacy to the Plaintiff; upon which it is impossible to suppose, that he had forgotten the terms, upon which he had given it. The Defendant states, that in a subsequent conversation the testator informed him, that the Plaintiff had used him very ill; and he was determined, she should not continue "in his service, or in his house;" putting it in the alternative; and the true question is, whether, determining, that she should not at that period be in his house, he had really dismissed her from

his service. That is the fact to be tried. Upon what terms she went into his service, whether he had the power to discharge her immediately, what were the conditions of the contract of hiring and service between them, do not appear in the cause. In every part of the answer the Defendant cautiously distinguishes between quitting the house and the service; showing the different notions in his mind. The answer of Rogers is to the same effect. The Defendants therefore raise the possibility of a fair distinction between quitting the house and the service; and state their belief, that the testator considered her as quitting the service; but not even as to their belief that she so considered it.

The first objection to the evidence is, that these three witnesses are proposed to prove the declarations of the testator; that according to the rules of evidence, particularly with reference to the Statute, evidence of this \* kind cannot be read. Certainly it could not be read, if proposed to prove the testator's intention, [\* 489] that the Plaintiff should have the legacy, though she should not be in his service at his death; but, if to determine, whether in fact she had left the service, it is clear, that the declarations of the testator, one of the parties to the contract, may prove, whether he considered her as having left it, and whether she had left it in fact: especially where, whatever belief the Defendants suggest, they produce no evidence or fact beyond the mere circumstance, that she quitted the house; coupling it with their own statement, that they do not know, whether she considered herself as quitting the house or service, always stating it in the alternative. The effect otherwise would be great injustice; as no person except the master and servant can give evidence upon that; and from necessity the master must explain, *quo animo* he sent her from the house; whether as putting an end to the relation entirely; or only suspending the performance of her service.

The next question is, whether the conclusion of the Master of the Rolls upon the evidence is right; and upon this question of fact it must be perfectly clear, that the relation was dissolved, which must be taken to have subsisted until within a few days of the testator's death. The testator must be understood as speaking with relation to a person, according to the condition expressed; as still in his service; though not actually in his house. The result of the evidence is, that, the testator after her departure conversing upon the question, whether he should leave her a legacy weekly, or as he had left it by the Will, upon the advice of one of the witnesses concludes, that he will not alter his Will; and that is the declaration of a testator; who from what he had said a few days before must have considered her as being still in his service.

\* Upon the whole of this case I think the Decree right; [\* 490] and, protesting against the admission of evidence to alter a Will, I consider the service as clearly established; and even upon the answers it cannot be represented as dissolved; that the declarations of the testator may be admitted to prove the fact, whether the

service was dissolved, or not; and unless it had been proved clearly dissolved, with the clear evidence, that it had subsisted, the Defendants representing the fact equivocally, and the Plaintiff being an object of the testator's bounty, it is fair to construe his declarations favorably to her; and the fair and reasonable construction is, that the testator considered the Plaintiff in his service, though not in his house.

The Decree was affirmed (1).

EXTRINSIC evidence must not be used in order to construe the plain words of a will, but recourse may be had to such evidence to show with reference to what particulars the will was made: *Bengough v. Walker*, 15 Ves. 514; the notes to which case, see, *ante*; see also, the next note here following.

## STANLEY v. STANLEY.

[1809, Nov. 29, 30; Dec. 1, 7, 9, 11.]

PROVISO, that if any of the tenants for life in a devise and executory trust, to convey in strict settlement, shall become possessed of the family estate, the devise or limitation directed shall thereupon cease, and become void, or not take effect, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the possession.

The first tenant in tail entitled under the proviso notwithstanding the descent of the other estate upon his father, the first devisee for life.

Rents and profits under a trust to accumulate, being in the event not disposed of, belong to the heir at law.

Devise to trustees and their heirs in trust to receive the rents, &c. until A. shall attain twenty-one; and immediately after he shall attain twenty-one to convey to the use of A. for life, and from and after the determination of that estate by forfeiture or otherwise in his life to trustees and their heirs during his life upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A. before twenty-one, upon a similar trust for other persons. A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last.

Direction to trustees to correct any defect or incorrect expression in the Will, and to form the settlement from what appears to them to be the testator's real meaning, does not authorize them to change the limitations.

CHARLES STANLEY by his Will, dated the 18th of May 1791, devised all his messuages, lands, &c. at Aughton and other places in the county of Lancaster to the use of his nephews Sir William Stanley and Thomas Stanley Massey, their heirs and assigns; upon the trusts, and for the several intents, &c. after mentioned: viz. upon trust, that they and the survivor, and the heirs and assigns of such survivor, shall receive the rents and profits of the said estates,

(1) *Ante*, *Parsons v. Parsons*, vol. i. 266; and the note, 267.

"until Thomas Massey the now second son of my said nephew Thomas Stanley Massey shall attain the age of twenty-one years;" and upon \*farther trust, that they shall immediately after the said Thomas Massey shall have attained his age of twenty-one years convey and assign all the said estates for the uses after mentioned: viz. to the use of the said Thomas Massey and his assigns for and during the term of his natural life without impeachment of or for any manner of waste; with such power of leasing and other powers as hereinafter mentioned, or in such other proper manner that he and they may enjoy the same to that extent; and from and after the determination of that estate by forfeiture or otherwise in the life-time of the said Thomas Massey to trustees and their heirs during the life of the said Thomas Massey, upon trust to preserve and support the contingent uses and estates hereinafter limited or directed to be limited from being defeated or destroyed; and for that purpose to have power to make entries, &c.; but nevertheless to permit Thomas Massey and his assigns to receive the rents, &c. for his and their own use during his natural life; and from and after the decease of the said Thomas Massey unto the use or for the benefit of the first and all and every other son and sons of the body of the said Thomas Massey, successively, and to the heirs male of the body of every such son, &c.; and, for default of such issue, or in case of the death of the said Thomas Massey, before he attains the age of twenty-one years, to the use of Sir William Stanley and Thomas Stanley Massey, their heirs and assigns; upon trust that they shall receive the rents, and profits "until John Massey the now third son of my said nephew Thomas Stanley Massey shall attain the age of twenty-one years;" and immediately after the said John Massey shall have attained the age of twenty-one years, to him for life; with remainder in the same manner to his first and other sons; with similar limitations to Charles, the fourth son, and his first and other sons; and for default of such issue, or in case Charles Massey shall die under twenty-one, \*to the use of Sir William Stanley and Thomas Stanley Massey, their heirs, &c. until some other son of Thomas Stanley Massey, now born, or to be born before the making of such settlement, shall attain twenty-one; and from and immediately after such son shall attain twenty-one to the use of such son for life; with similar remainders to the first and all and every other son and sons of the last-named son of Thomas Stanley Massey and the heirs male of the body of such last-named son; and, for default of such issue, to the use of all and every other the younger son and sons of the said Thomas Stanley Massey, successively, and the heirs male of the body and bodies of such younger son and sons; with the ultimate remainder to the testator's right heirs.

The testator then, after giving powers of leasing to Thomas, John, and the several other younger sons of Thomas Stanley Massey, when severally in possession, and of jointuring, directed the trustees

with the rents and profits, to be received by them, to purchase estates in fee-simple in Aughton, &c. and settle the same upon the same trusts; and until such purchase the interest of the said rents to accumulate, and be applied in like manner in the purchase of lands upon the trusts aforesaid. Then came the following proviso:

"Provided always, that in case the said Thomas Massey, John Massey, and Charles Massey, or any of them, or any other younger son of the said Thomas Stanley Massey shall become possessed of the estate at Puddington in the county of Chester now in the possession of my said nephew, Thomas Stanley Massey the devise or limitation herein before made or directed to be made of the messuages, tenements, lands, and hereditaments hereinbefore devised to such of them so becoming possessed as aforesaid shall thereupon [\* 494] cease and \*become void or not take effect or be made as the case may be and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the possession of the said messuages, tenements, lands and hereditaments, hereby devised, any thing hereinbefore contained to the contrary thereof in any wise notwithstanding."

The testator then, after several legacies, gave all the residue of his personal estate to John, Thomas, and Charles, Massey, and all and every other the children of the said Thomas Stanley Massey, whether sons or daughters, except his eldest son, equally; but to be confined to those living at his death, or born before the eldest attained twenty-one; with survivorship in case of death under that age or unmarried; and, after the usual powers for changing trustees, and a direction; that, until the settlement shall be made, the trust estate, rents, &c., shall be held according to the trusts, declared, that, in case Thomas Massey, or any of the other parties, to whom, or to whose use or benefit the testator had given, or directed to be limited, &c. as aforesaid, should die before the settlement, such death should not prevent the making such settlement upon the trusts, &c. not defeated or done away by such death.

The Will also contained the following direction:

"And I do hereby farther direct and authorize my said trustees in making the settlement herein before directed to correct any defect in legal or technical or other incorrect expression in this my Will and to form such settlement from what appears to them to be my real meaning with all and every the powers herein before inserted and the farther powers of exchanging any of the lands herein before devised in the usual way with the consent of the tenant [\* 495] \*for life or in tail if in being or otherwise at the discretion of the said trustees and such other like powers as may appear to my said trustees or the survivor of them his heirs and assigns convenient and proper."

The testator died without issue upon the 1st of September, 1792. At that time Thomas Stanley Massey, who upon the death of his cousin, Sir William Stanley, in the beginning of that year took that surname, and became Sir Thomas Stanley Massey Stanley, Bart.

had five sons: William, Thomas, John, Charles, and James; and afterwards a sixth, Henry. In February 1795 Sir Thomas Stanley Massey Stanley died; and in June 1800 upon the death of his eldest son Sir William Stanley Massey Stanley, an infant, his next brother and heir at law Thomas, the first devisee under the Will of Charles Stanley, succeeded to the title, and to the Puddington estate; and upon the 23d of January, 1804, attained the age of twenty-one. John and James died: the former in August 1808; having attained the age of twenty-one in February 1805.

The Bill was filed on behalf of William, the only son of Sir Thomas Stanley Massey Stanley; born on the 24th of November, 1806; claiming as tenant in tail male of the devised estates; and praying that a proper settlement may be made; that the trusts of the Will may be carried into execution; and an account of the rents and profits, &c.

The Defendant Sir Thomas Stanley by his answer stated, that he received the rents from the 23d of January, 1804, when he came of age, until February, 1805; when his brother John, being twenty-one, took possession: and received the rents until his death. Thomas claimed, as heir at law, whatever interest was undisposed of; \* and John by his answer claimed under the [\* 496] proviso from February 1805.

Sir Samuel Romilly and Mr. Shadwell for the Plaintiff.

In the event, that has happened, the Plaintiff is clearly entitled under the terms of the proviso in this Will, as the person next in remainder under the limitations of the conveyance, directed to be executed. If the testator's object was merely to prevent the union of the estates, and the consequence was pointed out to him, he probably would have made a more effectual provision against that event: but, as he has not done so, the Plaintiff is clearly entitled. The circumstance that he was not born, when the Puddington estate devolved upon his father, is of no importance; as there is a trust to preserve contingent remainders. The words apply clearly to the first and other sons; and it cannot be maintained, that the next brother is entitled: Doe on the demise of *Heneage v. Heneage* (1): *Nicholls v. Sheffield* (2): following *Chapman v. Blisset* (3), and many other cases.

Sir Arthur Piggot and Mr. Heald, for the Defendant Sir Thomas Stanley, the heir at law.—The rents, received during the minority of the Defendant, are clearly given to the trustees: but, whether the effect of the proviso, in the event, that has happened, is to prevent any estate ever arising to the present Sir Thomas Stanley, if his estate for life was merely contingent, or to determine an estate previously vested, as the heir at law of the devisor he claims the rents of the estates, devised and to be purchased, accrued in the interval from January 1804, when he attained the age of twenty-one,

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(1) 4 Term Rep. 13.

(2) 2 Bro. C. C. 215.

(3) For. 145.

to November 1806; when the Plaintiff was born. They are not disposed of to any person. The Plaintiff, not being then in existence, cannot claim them: nor is there any foundation for a claim by the representative of John from the time, when he attained the age of twenty-one, in 1805; as the only events, in which he was to take at that age, were failure of issue of his elder brother, or his death under the age of twenty-one; neither of which events happened. The title of the heir at law to all real estate, legal or equitable, not disposed of, is established by the case of *Hopkins v. Hopkins* (1).

Mr. *Richards*, Mr. *Leach*, and Mr. *Wingfield*, for the Defendants Charles and Henry, the surviving younger children of the late Sir Thomas Stanley.—The conveyance, to be executed under this executory trust, should be conformable to the intention, collected from the Will. The plain objects of this testator was to create a second family; with that object making these estates a provision for a younger son; meaning, that the Puddington estate, belonging to the head of the family, should not be united with them. That, his principal object, must necessarily be disappointed by the Plaintiff's construction. Very slight expression will be sufficient to carry the estate according to the obvious intention, appearing by the limitations, directed to be made to these younger sons, and the whole scope of the Will. They are the persons, entitled under the description in the proviso, "the *persons* next in remainder under the said limitations, or directions." The inference from the word "*persons*," in the plural number, is, that the eldest son of the first tenant in tail was not intended; and persons, then in existence, next capable of possession and enjoyment, were contemplated. A

[\* 498] subsequent clause gives the trustees a very extensive latitude to correct any defect, or incorrect expression, in his Will; and to form the settlement from what appears to them to be his real meaning. They cannot be controlled in the exercise of that personal power according to what they conceive to have been, and what plainly was, his real meaning. The instant the other estate fell upon Sir Thomas Stanley, the limitation over attached in the next brother, subject to be divested. It was not to remain suspended, until the death of the person, taking the Puddington estate, had ascertained the event, whether he would leave issue, or not.

Mr. *Benyon*, for the personal representative of John, the second son of the late Sir Thomas Stanley, admitting, that John had no title, until he was of age, claimed upon that event, and from that period, the rents and profits: insisting upon the express provision against the effect of inaccuracy; directing the trustees to frame a settlement, not according to the terms, but collecting the real intention from the whole of this inaccurate Will: the declaration of the testator himself, that it is informal, and the provision he makes under that impression, presenting a case much stronger than those, in which

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(1) For. 44; 1 Ves. 268; 1 Atk. 581.

the Court has gone a great length in deviating from the strict letter of the contract or Will.

Supposing, however, that this devise is to be construed, not, with latitude, as an executory trust, but strictly, that strict construction is, that upon the event taking place the estate went over, first, to the trustees to preserve contingent remainders; and upon John's attaining the age of twenty-one to him: the next remainder-man being, according to the import of the expression, "thereupon entitled to the possession," a person, capable of possession at the time of the event; viz. the union of the estates: not one, who [\*499] might come into existence at the distance of fifty years; to whom the description is perfectly inapplicable. The intention was to dispose of every part of the estate: there is no period in which it was not disposed of; and John being under this proviso entitled immediately upon the event, which would have united the two estates, the heir at law has no claim; as in the case of *Hopkins v. Hopkins*.

Sir *Samuel Romilly*, in reply.—If the Plaintiff had been born, before the Puddington estate fell upon his father, the other estates must by the express words have gone to the Plaintiff: but in the case, that has happened, that Sir Thomas Stanley had the Puddington estate before the birth of a son, it is contended, that by a strict construction of the words John, or in the event Charles, is entitled. That is not the true construction. According to the strict expression, John was not, nor is Charles now, the next in remainder; as until failure of issue of Thomas the estate could not go over. If the condition had been residence in the mansion-house, it could not be contended, that none of the children, entitled as tenants in tail, would have taken; but that the estate must have gone to the person, next named.

The argument of the Defendants must therefore be maintained, not upon the strict construction, but upon the general intention, supposed, to create two families; and a general intention to disconnect these estates must be admitted, to a certain extent; that they should not unite in the persons of any of the tenants for life: but beyond that, the Court should direct a settlement to be approved by the Master according to the limitations, \* pointed [\*500] out in the Will. It is supposed, that the intention might have been to separate the estates, as far as by the rules of law and equity could be. The most effectual way of executing that purpose would have been to pass over, not only the first son, and all his issue, but also the second, third, &c.; inverting the usual course; beginning with the youngest; and proceeding in the succession upwards. That mode, however, would only insure the separation for a longer time; but would not reach the period, to which it is supposed that the testator intended the separation to continue; as any tenant in tail in possession might, not having then the Puddington estate, prevent the effect of this clause by a recovery. Great difficulty prevailed previously to the case of *The Duke of Newcastle v. Lady Lin-*



*coln* (1) as to the nature of the settlement ; which was got over by the Court, adopting a certain form of settlement ; as in that case, preventing the leasehold estate vesting in a tenant in tail, before the age of twenty-one : but what is the form of settlement in this case to exclude all, who might become tenants in tail ? The intention to separate these estates would be answered as well by a limitation to the second son. No certain form can be pointed out. The intention was only, that the estates should for a certain time be kept separate ; and, as expressed, it is confined to the enjoyment of the tenants for life. The Court, going farther, will make, not interpret, the Will ; and should collect the intention from the whole Will, not by conjecture upon superfluous words.

*Dec. 1st.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT] suggested this difficulty : Thomas Massey, not having, when the Puddington estate devolved on him, reached the age of [\* 501] twenty-one, \* until which time the estates of the devisor were not to be conveyed to him, never took any estate for life in those estates ; and, the limitation to trustees to preserve contingent remainders in the settlement, to be made, was expressed to be from and after the determination of his estate for life by forfeiture or otherwise in his lifetime. The effect of that might be material with regard to the interests, which the trustees were to support, and the title of the heir. Were the trustees to continue taking the rents and profits, until that person, who in the event became entirely unconnected with the estate, attained the age of twenty-one ; and what would be the effect in framing the settlement ?

The cause stood over for farther argument : *Boraston's Case* (2) being referred to, as an authority, that Thomas Massey, (now Sir Thomas Stanley,) took a vested remainder for life upon a chattel interest in the trustees during the period of his minority.

*Dec. 9th.* For the surviving younger sons of the late Sir Thomas Stanley.—The effect of this proviso, with reference to the suggestion, that has fallen from the Court, must be considered, as operating either upon a limitation executed, or an executory trust. The question is, at what period these trustees were to make the conveyance ; which was to be made only, if Thomas Massey became entitled to the use during his natural life, at his age of twenty-one : but, when he attained that age, he had ceased to have any interest in the [\* 502] estate. The trustees therefore \* could not then make the conveyance for the purpose of giving him an estate for life ; and must continue to receive the rents, until some other son of the testator's nephew attained the age of twenty-one. The consequence is, that the conveyance was to be made, when the power of the trustees to receive the rents determined : some other person acquiring

(1) *Ante*, vol. iii. 387 ; xii. 218.

(2) 3 Co. 19.

the right to receive them ; which right was to be clothed with the legal title by the conveyance. The true construction is, that the trustees took a fee ; upon trust to receive the rents and profits, until some younger son of the testator's nephew should attain the age of twenty-one ; and, not having the Puddington estate, should become entitled to these rents ; or until the death of all of them under that age. The effect of such a proviso is to determinate the estate, as if the person had been removed by death. That is the language of conveyancers. If Thomas Massey at the time of the accession of the Puddington estate had died, being then under the age of twenty-one, the limitation to his issue, depending on his attaining that age, could not take effect. The consequence under this proviso must be the same. He did not in the sense of this Will live to attain the age of twenty-one ; being removed under that age by this proviso as effectually as if by death ; and the capacity of his issue to take depending on his attaining the age of twenty-one, and becoming entitled to this estate.

Secondly, considering this, not as a limitation executed, but as an executory trust, to be carried into effect under the direction of the Court, the general intention is apparent to consider these persons and their issue as stocks and classes of persons : and the trust therefore, failing as to the stock, failed altogether, as to the whole class. The accession of the Puddington estate was to defeat the interest of the sons. That can be imputed \* only to the in- [\* 503] tention of establishing a second family. The testator could not mean to deprive the father of the estate for no other purpose than to give it to the son, discharged from the obligation of relinquishing it upon the accession of the Puddington estate. The principles, which must govern this case, are supported by the authority of Doe on the demise of *Heneage v. Heneage* (1) ; though there is some difference in the limitations.

*For the Plaintiff.*—Considering this as a legal limitation, Thomas Massey clearly would have taken an estate for life in remainder upon a chattel interest in the trustees ; according to *Boraston's Case* ; and many subsequent cases, collected by Mr. Fearn : particularly *Mansfield v. Dugard* (2) : that estate for life subject to forfeiture upon the accession of the Puddington estate. It is impossible to conceive, that the testator could intend, that, if any of those persons, whom he proposed to make the stock of another considerable family, should die at the age of twenty, leaving issue, the estate should go from them to another branch of the family. What is the supposed general intention ? An intention to keep the estates separate during the lives of the tenants for life is admitted : but does it go farther ; and how far ? Not for ever : not as far as possible ; as the obvious mode of extending the improbability of uniting the estates was by taking the youngest son, and proceeding in succession upwards.

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(1) 4 Term Rep. 13.

(2) 1 Eq. Ca. Ab. 95.

As to the difficulty suggested in framing the settlement, if the trustees had been called upon immediately after Thomas attained the age of twenty-one, and before \* he had issue, the estate would have been vested in trustees during his life, or until he should have a son; then with the remainders to that son, and the other sons successively in tail: then to John for life; with similar limitations to his issue, &c.; as near as possible to the course, directed by the Will. The effect of the proviso and the event of the descent of the Puddington estate is, that this limitation is out of the question. His incapacity of ever taking these estates is the same, as if they had devolved upon him, and been divested.

*For Sir Thomas Massey, the Heir at Law.*—The whole legal estate being vested in trustees, upon trust to receive the rents and profits, until Thomas Massey should attain the age of twenty-one, and then to convey to him for life, he had a vested equitable estate for life in remainder upon a preceding term in the trustees for so many years as should elapse, before his age of twenty-one: an estate commencing in interest from the death of the testator; and in possession at the devisee's age of twenty-one. That estate was defeated in the year 1800 by the event of a condition subsequent: the descent of the other estate: but still the authority of the trustees to receive the rents remained until 1804; and from that period to 1806 they are not disposed of; and must go to Sir Thomas Stanley, as heir at law. For this purpose there is no distinction between legal and equitable estates. Considering these as legal estates, with trustees to preserve contingent remainders, could the next subsequent remainder-man come in, and exclude all the issue? Would this Court supply words for the purpose of excluding all the sons of the first tenant; destroying those contingent remainders; and letting in the next tenant for life? If these are, not legal limitations, but executory, the execution \* must follow the intention; which is, that the limitation to the tenant for life being displaced by his accession to the other estate, all his sons are to be exhausted, before the next tenant for life can be let in.

*Reply.*—The effect of these limitations is, that Thomas Massey was to take nothing, before he attained the age of twenty-one: until that period the trustees were to take: and if he died under that age, the remainder to the next son was immediately to take effect. In *Boraston's Case* there was no limitation over, in case the youngest son did not attain twenty-one. The whole estate was devised to him, subject only to a term, but under no contingency: a present interest; which would descend to his heir: not given over; and the estate not to fail, if he died under twenty-one. In this case the estate of Thomas depends on his attaining twenty-one. In *Mansfield v. Dugard* (1) there was no contingency. Under this devise the estate of Thomas was to take effect only upon his attaining twenty-one; and the period of vesting never arrived. If he had died under twen-

ty-one, leaving issue, that issue would not have taken: the estate of the trustees being to determine only on his attaining the age of twenty-one.

*Dec. 11th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—

It is clear, that in this case the trustees took, in the first instance, the whole legal interest. The trusts, upon which they were to hold it, were to receive for a particular purpose, until Thomas Massey should attain the age of twenty-one; and at that age to convey to him for \*life with several remainders over, hereafter more [\* 506] particularly to be noticed. One question, that was made, is, what interest Thomas Massey took: whether a vested estate, or a contingent interest for life. This was considered material with reference to the different effect, which it is supposed the proviso as to the devolution of the Puddington estate might have; as it should be construed to operate so as to prevent any estate ever arising to him, or to determine an estate, previously vested in him. It is not clear to me, that this question is so material, as it was contended to be: but my opinion, upon the authority of a great number of decisions, from *Boraston's Case* (1) downwards, is, that he took a vested remainder for life after an estate in the trustees for so many years as his minority might last.

It was argued, that this case is distinguished from those to which I have alluded, by the circumstance, that in a subsequent part of the Will the estate is given over upon the death of Thomas Massey under the age of twenty-one: from which it is said he could not be intended to take any estate, until he should attain that age. Without entering into the question, whether the Court would not there supply the words "without issue," it is sufficient to say, that the event, upon which an estate is given over, cannot determine, what is the event, upon which it is to vest; and there are cases, in which the same words occurred without at all affecting the construction. In *Taylor v. Biddall* (2) the devise was to Elizabeth, the devisor's sister and heir for so long time, and until her son Benjamin Wharton should attain his full age of twenty-one years, and after he shall have attained his said age, then to the said Benjamin and his heirs for ever; \*and if he die before his age of twenty-one years, [\* 507] then to the heirs of the body of Robert Wharton, and to their heirs for ever, as they should attain their respective ages of twenty-one years.

The doubt upon that was, whether the devise over to the heirs of the body of Robert could take effect; as he was alive at the death of Benjamin; and no one could answer the description of his heir until his death. The Court thought, it was not very material to determine, whether the devise over could, or could not, take effect upon that account; as the same person, who would have taken as heir

(1) 3 Co. 19.

(2) 2 Mod. 289; 1 Freem. 234.

of the body of Robert, was heir at law to Benjamin; in whom the estate vested immediately upon the testator's death; and, though he died under twenty-one, descended to his heir.

In a case mentioned by Lord Mansfield in the case of *Goodtitle v. Whitby* (1), upon a devise to the testator's brother in trust for his eldest son B. till he should attain twenty-one years, and if he should die before twenty-one, then a devise over, the Court held the age of twenty-one to be no limitation of B.'s interest, but only a limitation of the trust during his minority; and that B. took the whole by implication.

It is not material, that the estates in this case are to be settled by a conveyance, directed afterwards to be made; for I think, there is nothing in the difficulty, that struck me with regard to the manner in which the conveyance was to be formed in the event of the Puddington estate having devolved upon Thomas Massey before his age of twenty-one; as the right cannot in any degree depend [\* 508] upon the conveyance, to be made: but that conveyance must conform to the rights, as declared in the Will; which operates as an equitable conveyance, until the legal conveyance came to be made. Upon the Will the limitation stood thus: to the trustees for so many years as should elapse from the birth of Thomas Massey, until his age of twenty-one; and from his majority then to him for life: with remainders to trustees to preserve contingent remainders, and to his first and other sons, &c.; and then comes the proviso as to the Puddington estate, that in case Thomas Massey, John Massey, and Charles Massey, or any of them, or any other younger son of Thomas Stanley Massey, shall become possessed of the estate at Puddington, the devise or limitation, before directed of the estates, before devised to such of them, so becoming possessed, shall cease, &c.; and the persons next in remainder under the said limitations shall thereupon become entitled. The Puddington estate having devolved to Thomas Massey, in 1800, his estate for life in the premises devised, which had vested in interest, ceased and determined, so as never to take effect in possession; though the period arrived, at which but for that event he would have been entitled.

The question then is, who became entitled under the limitation in the preceding part of the Will, as the person next in remainder under the said limitations or directions. By that description must be meant the person next in remainder after the person, upon whom the Puddington estate devolved. It is not easy to conceive, how John could say, he sustained that character, and answered that description: there being a previous limitation, or; which is the same thing, a direction for such limitation, to trustees to preserve contingent remainders; and remainders to the first and other sons of Thomas Massey. It was however contended, that, as the next [\* 509] person in remainder was to become entitled to the possession, he must be a person capable of possession; and therefore a son of Thomas could not answer that description. The

(1) 1 Bur. 228; see 234; *Tomkins v. Tomkins*; in Chancery, Hil. 17 Geo. II.

answer to that objection is, that the trustees to preserve contingent remainders were the next; and they were capable of possession: and under the protection of their estate the contingent remainders to the first and other sons of Thomas were also to be considered as subsisting remainders, to prevent John's answering the description of next in remainder. That was the answer, given in the case of Doe on the Demise of *Heneage v. Heneage* (1) to the very same objection, upon stronger words in favor of it: viz. "succeed to and have and enjoy:" words, pointing to a remainder-man, capable of the immediate beneficial enjoyment: here the description is only a person, entitled to the possession; and the trustees were certainly capable of possession; though not of the beneficial enjoyment. No weight was in that case given to the argument, that, if the trustees enter, they must take the rents for the benefit of the tenant for life; which would be directly contrary to the intention; as that part of the trust must fail, which consisted in permitting the tenant for life to take the rents and profits. That is no reason, why their estate should not take effect; which was created primarily to protect the contingent remainders.

That case may be liable to doubt upon a circumstance, that does not occur here. In the event, there declared, it was not merely, that the interest should cease and determine, and the next remainder-man take, &c.; but, that he should take, as if the preceding purchaser were dead. If the tenant for life in that case was to be considered as dead, there might be a doubt as to the right of the \* trustees to enter, as they had only an estate for [\* 510] his life; and, if he was to be considered as dead from the moment the other estate came to him, a question might have been made, whether he was not to be taken as dead without issue: no issue being then born.

In the subsequent case of *Carr v. Lord Erroll* (2) some doubts were expressed upon that case: but, as the Court of King's Bench did not declare their reasons, it does not seem, that it was thought necessary to deny the authority of Doe on the Demise of *Heneage v. Heneage*. The Will in *Carr v. Lord Erroll* declared, that, if any of the devisees should succeed to the title of Erroll, the limitations to such persons should cease, determine, and be utterly void to all intents and purposes whatsoever, as if such persons were dead without issue; and the estates should go to the person, who should be next in remainder to such persons, &c. in case he, she, or they, was or were dead without issue male of his, her, or their, bodies. Though there was no express provision, that in such event the estate, limited to preserve contingent remainders, could cease and determine, yet it was held, that it should not take effect consistently with the other provision; and the consequence was, that a remainder-man, more remote, not only than the issue of the person, who did succeed to the title, but others, who might by possibility have come into *esse*, became entitled.

(1) 4 Term Rep. 13.

(2) 6 East, 58: *ante*, vol. xiv. 478.

Here the provision is only, that the limitation shall cease and become void. There is no word to assimilate the determination of the preceding estate to a determination by death. It is therefore a determination in the life of Thomas Massey; in which case the trustees might certainly enter: the limitation being in the usual \* form, upon determination by forfeiture or otherwise in the life of Thomas Massey.

It was said, lastly, that, being an executory trust, it is to be executed by directing the conveyance, so as best to answer the apparent intention: viz. to prevent the union of the two estates in the same person, and to keep them asunder as long as can be by law. The testator has not said, that was his intention. It is only inferred from the provision for the purpose of preventing the union of the estates in certain persons specified. What ground is there for extending to other persons the incapacity of holding both estates? He has not said, that a son of Thomas shall lose the devised estate by becoming possessed of the Puddington estate. Is the Court to say that, not because he has, but because he may possibly, become entitled to that estate? The testator has not completed his purpose by this proviso. He authorises the trustees to correct any defect or incorrect expression; and to form the settlement according to his real meaning: not to change the limitations. A direction to them to follow his true meaning, rather than the literal construction, of his Will, is very different from an authority to new mould the limitations; if they suppose, those, which he has directed, will not have the effect he intended. There is no reason to suppose, he intended either the trustees, or this Court, to have such a power.

The Plaintiff is therefore entitled, as tenant in tail, to the premises, devised by the Will of Charles Stanley. As to the rents and profits, the trustees continued entitled to receive them for the purpose of being laid out, until Thomas should attain the age of twenty-one; though his interest for life might have determined before that age.

The rents, received between that period and the birth of [\* 512] the Plaintiff, are undisposed of; and belong to the heir \* at law. John is no more entitled to those rents than Dare, the next remainder-man was in the case of *Hopkins v. Hopkins*. The rents from the birth of the Plaintiff belong to him. The rights are to be declared accordingly.

1. A DEVISE over, upon a contingency, cannot, of itself, prevent the interest from vesting in the mean time: *Skay v. Barnes*, 3 Meriv. 340; and see, *ante*, note 3 to *Malin v. Keighley*, 2 V. 333. The testator's intention to secure an estate to successive devisees cannot authorize a court to introduce, by implication, any provision which the testator has not indicated; and if, where nothing is expressed nothing is to be implied, it would be still more out of the question, where something is expressed, to imply more than is expressed; the testator's intent must be measured by the provisions he has himself made: *Wheate v. Hall*, 17 Ves. 85 (the note to which case see, *post*); *Brewster v. Angell*, 1 Jac. & Walk. 628; *Nash v. Smith*, 17 Ves. 32. It is true, that a deed, and a *fortiori* a will, is to be expounded according to the maker's intention; but no court will new model the instrument itself or alter dispositions which are in themselves clear and unambiguous, merely because they happen to be ineffectual to the attainment of the end which

may be supposed to have been in view: *Cholmondeley v. Clinton*, 2 Meri. 343. A court must not make a new will for a man, or dispense with any rule of law to prevent the testator's intention from being disappointed: (*Langham v. Sandford*, 2 Meriv. 24): though, where the language he has used is not explicit, the purposes which a testator was contemplating may, properly, have some influence upon the construction of his will: see note 4 to *Blake v. Bunbury*, 1 V. 194; and, also, the last preceding note.

2. The case of *Tomkins v. Tomkins*, (adverted to in the report of the principal case, as having been cited by Lord Mansfield in 1 Burr. 234), was heard before Lord Harkwicke in Hil. T. 17 Geo. II. (27th Jan. 1743), and the following note thereof is extracted from Mr. Forrester's ms.:

"William Tomkins by will gave 200*l.* to his brother Joseph, and afterwards gave him his leasehold brewhouse and utensils, and all the rent that should happen due thereon, in trust for the benefit of his eldest son Benjamin, till he should attain twenty-one; but, if he died before twenty-one, then he gave it to his second son, Joseph. Then he gave 50*l.* a-piece to each of his other children, and made his brother Joseph executor, giving legacies to all his next of kin, particularly 20*l.* to his sister Benjamin, and to her three children 50*l.* each, but died without making any disposition of the surplus. The testator had no sister Benjamin but the wife of his brother Benjamin, and she had four children. Upon this will, very inaccurately drawn, several questions arose: namely, as to what interest Benjamin took in the brewhouse; whether Joseph, the second son, came within the description of other children; whether the wife of the testator's brother Benjamin could take, as being sufficiently described; and, also, what should become of the surplus, here being legacies given to all the next of kin, as well as to the executor. Lord Hardwicke pronounced his judgment as follows: 'This is a very inaccurate will; but, as to the legacies given by the testator to his sister Benjamin and her children, I think the description sufficient, brothers' wives being often called by their husbands' Christian names for the sake of distinction; and, as it has been agreed that the legacies shall extend to the fourth child, it is not necessary for me to give any opinion upon it, but I should have thought it a favorable case for all the children. Had the testator expressed his gift to be to all her three children, this would certainly have let in the whole actual number, and the word three must have been rejected as repugnant. In the present case, indeed, the word all is not used, but her children are indefinite words, and to be construed universally: were they not to extend to all, the legacy would be void for want of knowing which three should take and what one should be excluded. The next and principal question is upon Benjamin's interest in the brewhouse; whether the words till he shall attain twenty-one are to enure as a limitation of his interest, or only the continuance of the trust in the trustees, the will not fully explaining the testator's intent, which must, therefore, be supplied by construction. Now, I think these words are to be considered only as a limitation of the continuance of the trust. The rent-devised must mean the arrears of rent due at the testator's death, not any fractional arrear which might happen to be due when Benjamin came of age; and the giving the brewhouse over upon one contingency shows, that if the specified contingency did not happen, the testator intended Benjamin should retain it. Something is given to every one of the testator's family; but, if Benjamin is not to hold this lease after his age of twenty-one, nothing will be given to the person whom the testator seems to have principally regarded, and this lease must fall into the residue of the personal estate, and go to persons for whom it was certainly not intended. Besides, very small transpositions makes the matter clear, for if this lease had been given to the use and benefit of his eldest son Benjamin, in trust till he came to twenty-one, there could not have been the least doubt of the testator's intent. I therefore think the dying before twenty-one is the only contingency upon which this interest is to be taken out of Benjamin. As to the question, whether the devise to the other children of his brother Joseph shall exclude Joseph, the contingent legatee, I think it shall not, as meaning only other than the eldest son Benjamin; for nothing is given to Joseph, the second son, in possession, and he ought, therefore, to be considered as one of those other children. Next, I think the legacy devised to the executor Joseph excludes him from the surplus of the personal estate, the late cases having gone farther than the former did on this head: that of *Foster v. Munt*, 1 Vern. 473, has been sometimes said to have been



determined upon the foot of fraud; but it does not appear, from the proofs in the cause, that any fraud was made out; and there it was first established, that a legacy to an executor, *for his care and pains*, excludes him from any farther benefit, it being plain, in such case, that he is intended only as a trustee. It was afterwards held, that a legacy given *generally* to an executor would have the same effect, because the testator could not intend to give him *all* and *some*, though, were that point to be settled *de novo*, there might be some reason for a different determination, as a legacy to the executor might be intended only to put him on a par with the other legatees, that in case of a deficiency he might still be sure of something in proportion with the others. But the law is now settled; nor has the giving a legacy to the next of kin been suffered to preclude them from the residue, where the executor has had a legacy given to him likewise. In some of the cases, legacies have been given to some of the next of kin; in others, to all: but in neither case have they been excluded from the surplus, their right being founded upon an equity arising from the Statute of Distributions, and they taking, by way of succession *ab intestato*, as the heir at law takes all such parts of the real estate as are undisposed of. I am, therefore, of opinion, that the surplus in the present case must be divided amongst the next of kin."

That an inaccurate description of a legatee will not necessarily render the legacy void, if it can be satisfactorily shown who was the individual really meant, see notes 2, 3, to *Parsons v. Parsons*, 1 V. 266. In *Garvey v. Hibbert*, 19 Ves. 125, a legacy was given "to the three children of A. the sum of 600*l.* each;" and, upon the authority of the above-stated case of *Tomkins v. Tomkins*, it was determined that all the children of A., born before the date of the will, were entitled to 600*l.* each: see the note to *Garvey v. Hibbert*, *Post*. As to the circumstances which may exclude a testator's claim to a beneficial interest in the residue of his testator's personal property not disposed of, see, *ante*, note 1 to *Bennet v. Bachelor*, 1 V. 63, with the notes to *Nourse v. Finch*, 1 V. 344; and that the mere fact of a gift of legacies to the next of kin will not rebut their claims, when the executors would otherwise be held trustees, see note 4 to *Clenel v. Leythwaite*, 2 V. 465.

## PEACOCK v. EVANS.

## EVANS v. PEACOCK.

[ROLLS.—1809, DEC. 13.]

PROTECTION in equity to an expectant heir, dealing for his expectancy, approaching nearly to an incapacity to contract. Relief against a very advantageous purchase from such a person without fraud; though mere inadequacy, unless from its grossness of itself, evidence of fraud, is between persons, standing precisely equal, of no account (a).

The relief on payment of principal, interest, and costs; the purchaser being considered as a mortgagee. His Bill, to establish the purchase, dismissed with Costs, except of depositions, used by the other party.

THE object of the Bill in the first of these causes was to obtain a Decree for a conveyance of estates according to articles of agreement, dated the 1st of March, 1801, for the sale of the equity of redemp-

(a) The relief is granted upon the general ground of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. 1 Story, Eq. Jur. § 336; see *ante*, note (c) *Coles v. Trecothick*, 9 V. 224; note (a) *Crouse v. Ballard*, 1 V. 215.

As to the effect of mere inadequacy of consideration in common cases, see *ante*, note (a) *Moth v. Alwood*, 5 V. 845.

tion and reversion to the Plaintiff; and a deed of appointment and confirmation under a power. The Bill in the second cause prayed, that upon payment by the Plaintiff in that cause, to the Defendant, who was Plaintiff in the other, of the sums, really paid by him, with interest, the Defendant Peacock may be decreed to deliver up the agreement and indentures to be cancelled.

By the articles of agreement William Evans in consideration of 500*l.*, to be paid to him by Peacock, pursuant to the covenant hereinafter contained, agreed; that he William Evans, and his heirs, would within one month after the decease of Charles Evans, the father of William, convey to Peacock, and his heirs, several estates in the county of Anglesea; and Peacock agreed, that he, \* his heirs, executors, &c. would upon making such conveyance at the time aforesaid pay to William Evans, his heirs or assigns, the said sum of 500*l.* for the absolute purchase and reversion of the said hereby bargained premises by instalments, as follows: the first instalment of 50*l.*, on the day of executing this indenture, and every three months after 50*l.*; and Evans agreed to pay 1000*l.* with interest, should he not fulfil the agreement; and farther to pay all expenses, that Peacock should be put to in trying to recover possession of the said tenements, “ which I have this day absolutely sold to the said William Peacock for thirty years’ purchase, allowing five years’ purchase to be deducted for my father’s life interest in them.” [\*513]

The circumstances, alleged by the Bill in the second cause, which was filed after the death of William Evans by his brother and heir at law Charles Evans, were, that William Evans was addicted to drinking, extravagant, improvident, and necessitous; being much in debt; and having no property, except a small allowance from his father: whose father in 1801 was of the age of seventy-five, and in a declining state of health; that Peacock, knowing these circumstances, applied to William Evans, and prevailed upon him to sell; that the articles were prepared by Peacock, or his Attorney; that he inserted the premises, called Harvey’s Quillets: Evans not at that time knowing, that they did not belong to Harvey; who was entitled only to a quit-rent out of them; with which Peacock was acquainted; that the articles were not perused by any Attorney on behalf of Evans; that the estates were of much greater value than 500*l.*; and the rents were not the full annual value; and the father’s life not worth more than two years’ purchase.

Charles Evans, the father, died on the 15th of September, 1802. \* Upon his death William Evans entered; and [\*514] continued in possession until his death in 1803. The Defendant Peacock by his answer and in his Bill denied all fraud; and represented, that the application to sell came from Evans; that the consideration was fair, &c.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Trower*, for the Plaintiff in the original cause. Mr. *Alexander* and Mr. *Wyatt* for the Defendant.

1809, Dec. 13. MASTER OF THE ROLLS [SIR WILLIAM GRANT].—No difficulty could have arisen upon this case, if it had not been that of an expectant heir, dealing for his expectancy during his father's life. To that class of persons this Court seems to have extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract.

In *Gwynne v. Heaton* (1) Lord Thurlow says, "here is a policy in justice, protecting the person, who has the expectancy; and reducing him to the situation of an infant against the effects of his own conduct;" and in *Coles v. Trecothick* (2), where inadequacy was not in question, the present Lord Chancellor says, "the cases of reversions, and interests of that sort, go upon a very different principle. In some the whole duty of making good the bargain upon the principles of this Court is upon the vendee; as in the instance of heirs "expectant."

The tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, [\* 515] seems \* not to have been considered as operating to prevent its adoption and establishment; but on the contrary, some Judges have avowed that probable consequence as being to them the recommendation of the doctrine.

In this case, though I think there is nothing approaching to fraud or imposition, yet it will not bear the test of that severe scrutiny, to which it must upon these principles be brought; as upon the whole of the evidence it is clear, that Mr. Peacock has obtained a very advantageous bargain. The consequence is, that he cannot retain it, against this person; though it was undoubtedly lawful for him to take the advantage, as against any one, who had been in the consideration of this Court upon an equal footing with him. I must take it for granted, that the offer was originally made by William Evans; that this was a bargain, not in the first instance of Peacock's seeking: but, when he had the caution to abstain from making an agreement with Evans at his own house, in February, in the absence of any witness, it was a great imprudence in him the next day, in the presence of a witness, who could not be of any use, himself to draw the agreement. It is quite evident, that the parties were incompetent to the task they undertook. They did not understand the subject. They seem to have supposed, that Evans could not convey his remainder in fee, subject to his father's life; and also, that, if Evans should die in his father's life, there would be an end of the agreement; and the estate could not be conveyed. At the end of the agreement there is an anxious provision, that at all events it shall be executed in six months under a penalty; and Evans is made to agree, that he shall be at the expense of insuring his own life against his father's; in order to guard against this supposed risk, which Peacock would run. They gave the agreement to an

(1) 1 Bro. C. C. 1; see page 9.

(2) *Ante*, vol. ix. 234, see page 246.

Attorney; who, when he came two days afterwards to carry it into execution, drew a deed, containing an immediate conveyance of the remainder. Who can tell, what effect that supposed risk may have had in determining the price? for it is not exactly the same thing to run no risk, and to be able to secure yourself against a risk by an insurance; which I suppose would only have returned to Peacock his 500*l.*: but what he wanted was the estate.

Another circumstance, appearing upon the face of the agreement, is, that Evans intended to have, and Peacock consented to give, thirty years' purchase; abating the father's life-interest; valued at five years' purchase. That abatement being made, it was just the same as if the father had been dead; and the amount of twenty-five years' purchase ought to have been immediately paid down. Instead of that the payment was to be made by instalments: the last at the distance of two years and a quarter. This is material, first, with reference to the accommodation, which was the object of Evans: secondly, in point of interest: this distressed man was obliged immediately to raise money upon the bond; when according to the true spirit of the agreement he ought to have had the money in his possession immediately upon the execution of the conveyance.

The material consideration however is the great under-value. It is true, the agreement is for thirty years' purchase of the then rents: but there was no previous inquiry as to the present value: how long those rents had been payable: whether they had been lately raised; or were old rents. Without any inquiry of that sort the purchase was settled immediately upon the rental: Evans recently released from gaol: Peacock, being the owner of the adjoining estate, had an opportunity of knowing the value of the land: the parties so far not precisely upon \*a footing: no witness brought [\* 517] forward, who says, that the price given was in his opinion the fair value. Peacock's witnesses made it 66*l.* for twenty-five, or rather twenty-three, years' purchase; for they estimate the father's life at seven years' purchase: upon what *date* I do not know; as it was not the agreement, that it should be so estimated; and no value was set upon what is called Harvey's Quillets. If that addition was made, the price ought to have been something more than 700*l.*: a considerable difference upon so small a price as 500*l.* Upon the other side six or seven witnesses swear to a valuation, that would bring the estate to 2040*l.* It is observed upon this evidence, that five or six different surveyors and farmers all agree to a shilling in their estimate: which at first sight does diminish the credit of their testimony: but upon inspecting the evidence, though some of them take no notice, that they valued in company with the others, two witnesses state it to be a joint valuation. It is therefore nothing more than that, making the valuation together, they came to a joint conclusion, that that sum of 68*l.* was the fair rental. It is true, that valuation was made three or four years after the purchase: but all the tenants say, there were no improvements of any kind in the interval: but the estate was rather grown worse in that period. Sup-

lands, &c. so charged and chargeable with the payment of the said annual sum or yearly rent-charge of 300*l.* and the powers and remedies for recovery thereof, therein before contained; and subject thereto, to the use of the said Charles Lea Jeffrey and Daniel Burley, their executors, &c. for the term of ninety-nine years from the decease of Guylott Cowherd upon the trusts after declared; and from and after the expiration or other sooner determination of the term, and subject thereto in the mean time, to the use of Guylott Cowherd, his heirs and assigns for ever.

The trusts of the term were declared to be for better securing to Anna Budd, the said annuity of 300*l.*; and the trustees were required by and out of the rents and profits, or by mortgage or sale, &c. to levy and pay the arrears of the annuity, &c. and then upon trust to permit the person and persons, who for the time being should be entitled to the freehold and inheritance of the premises, immediately expectant on the determination of the term, to receive the residue of the rents and profits; and it was provided, that in case the annual amount of the rents should not at the death of Guylott Cowherd be sufficient to produce the annuity, then the premises should be liable only to pay so much of said annual sum \* of 300*l.* as the [\* 521] fair annual rents and profits should extend to pay; unless the personal estate of Guylott Cowherd should not be sufficient for providing for such deficiency; and when the purposes, for which the said term was created, were fully performed, that the term was to cease and be void.

The usual powers of leasing, and appointing new trustees, &c. were given; and, besides the general covenant for title and farther assurance, Guylott Cowherd covenanted with the trustees for surrendering and assuring such parts of the premises as are copyhold to the uses, upon the trusts, and for the intents and purposes, and under and subject to the several powers, provisoes, declarations, and agreements, before declared, and it was farther declared, that, if the rents, &c. should not be sufficient to pay the said annual sum, &c. the executors, &c. of Guylott Cowherd should within six months after his decease pay to the trustees such sum out of his personal estate.

Guylott Cowherd died in May 1801; not having surrendered his copyhold estates, comprised in the settlement; leaving his widow, formerly Anna Budd, surviving, but no issue. By his Will, dated the 24th of April, 1794, he had devised various freehold and copyhold estates, including those, comprised in the marriage settlement.

The Bill was filed by the co-heirs at law of Guylott Cowherd; praying an execution of the trusts of the settlement, and the covenant as to the copyhold estates; if it shall appear, that he had surrendered and devised the copyholds; and that the surplus rents and profits, after keeping down the annuity of 300*l.*, may be divided among the Plaintiffs; and, if the Will was not revoked, then that the copyhold estates may be declared liable to contribute to the jointure rateably with the freehold estates, &c.

The devisees submitted, that the devise was not revoked by

the settlement; and that they were entitled to retain the estates, devised to them respectively, subject to the trusts of the term, and the annuity of 300*l*.

Sir *Samuel Romilly* and Mr. *Roupell*, for the Plaintiffs, observing, that, as to the freehold estates the point, that the devise was revoked by the subsequent settlement, is clearly settled (1), contended, that the revocation was also clear as to the copyhold estates by the effect of the covenant, upon consideration of marriage; according to the cases *Rider v. Wager* (2), and *Cotter v. Laver* (3): the inconsistency of the purpose affording evidence of an intention to revoke; which intention will be carried into effect by a Court of Equity; considering the act as done; not merely to let in the jointure, but for all the trusts and objects of that settlement.

Mr. *Leach* and Mr. *Roots*, Mr. *Richards* and Mr. *Newland*, Mr. *Fonblanque* and Mr. *Wetherell*, for the several Defendants.

If this devise must be considered revoked as to the freehold estate, that is the effect, not of the actual intention but of a positive rule of law, founded upon a presumed intention, collected from the mere form of the conveyance. There are however cases of exception; and this is one of them: a conveyance for a particular, express, purpose; going no farther; and, beyond that single object, leaving the interest in the estate, as it was before. It is very \*difficult to collect the principle, upon which the law [\* 523] of revocation, in the extent, to which it has been carried in some cases, stands. Where the object is a different disposition, it is more properly described as an ademption; taking away the subject of the devise. The principle ought to be, that the intention, if it can be discovered, should have effect. That principle however certainly has not been precisely adhered to: on the contrary there are cases of revocation against the clear intention: but it has prevailed to this extent: where the clear and only object was to introduce a charge, as by a mortgage in fee or a conveyance in fee for payment of debts, the devise beyond that object has not been affected. The sole object of this settlement, appearing by the recital, was to let in a charge for the wife: to make a provision for a jointure. Then how is the interest in the fee beyond that object disturbed, or affected? No new arrangement or power of disposition is proposed. The deviser continued seised precisely in the same right, and of the same quantity of interest, subject to the charge introduced; as in the case of a mortgage, or a charge for debts.

In Lord Lincoln's Case a different disposition was made of the whole fee; which would have been taken in a state, different from that, designed by the Will. There was all but an express revocation. A deed for the purpose of partition is clearly no revocation: yet in that instance the deviser parts with the estate he had; and the effect

(1) See *ante*, *Harmood v. Oglander*, vol. vi. 199; viii. 106, and the references in the notes; vi. 201; ii. 437.

(2) 2 P. Will. 328.

(3) 2 P. Will. 622; *ante*, *Knollys v. Alcock*, vol. v. 648; vii. 558.

is a clear alteration of his interest. Lord Rosslyn in the case of *Brydges v. The Duchess of Chandos* (1) anxiously guards against the conclusion, that a case equal to that of a mortgage, or a conveyance for payment of debts, may not arise; and the propriety of that observation is proved by the case of *Williams v. Owens* (2); [\* 524] which occurred soon afterwards. The \* doctrine, stated by Lord Alvanley, is, that the effect must be a new modification, that will break in upon, if not destroy, the limitations of the preceeding devise; but if there appears no other than the special, partial, purpose to make a provision for a wife; by ingrafting a charge in her favor upon the disposition of the Will, the limitation to the heirs is nugatory; not producing revocation even at law; the old use remaining, without any new modification, or different dominion over it. The late case of *Charman v. Charman* (3), shows, that the Court is not inclined to extend this doctrine.

The copyhold estate certainly stands under different circumstances: no legal estate being displaced; as with regard to the freehold estate by actual conveyance: the use resulting, as it must be contended, in a different state; and the deviser having taken that mode of introducing a charge, the effect being a revocation. In the case of *Cotter v. Laver*, the effect of the contract was, that the whole estate was taken away; which in equity became the estate of the purchaser. The conclusion as to these copyhold estates, that the sole object was to give the wife a rent-charge of 300*l.* per annum, by way of jointure, is inevitable. Upon what consideration can the heir claim to have the legal estate transferred from the devisees to him? He is merely a volunteer. The widow has a right to come here for the purpose of having her jointure secured: but the mode is perfectly immaterial. The conclusion is, that the Court, letting in the incumbrance, will not farther disturb the Will.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT] [\* 525]. having during the argument \* declared, that as to the freehold estate this case could not be distinguished from *Cave v. Holford*, desired Sir Samuel Romilly to confine his Reply to the copyhold estate; and made the following observations:

I am still at a loss as to the freehold estate to find a distinction between this case and *Cave v. Holford*; except in circumstances, unfavorable to the devisees. There were in that case two conveyances: the one with no object whatsoever, but to make a jointure for the wife, and to create a term for that purpose; which having effected, Sir Thomas Cave limited the estate to himself in fee; and the Will in that case had devised the estate subject to such jointure as he might make for any woman he might marry. That was a very strong case certainly: yet the devise was held to be revoked. Lord Chief Justice Eyre's argument is very able and ingenious; upon the

(1) *Ante*, vol. ii. 417.

(2) *Ante*, vol. ii. 595.

(3) *Ante*, vol. xiv. 580.

ground, that there was only a particular and partial purpose; and the conveyance was to operate only *pro tanto*, to the extent of that limited purpose: but the opinion of the Court of Common Pleas was, that this Deed was as much a revocation as the other: the Court of King's Bench was unanimous in affirming that judgment: afterwards, the cause coming on for farther directions, it was contended, that, though not at Law, in Equity, at least, there was no revocation as to one estate: yet it was held as much a revocation in Equity as in Law; and that Decree was affirmed upon Appeal. So, it appears to me, that this question is no longer open to controversy.

Sir Samuel Romilly, in reply.—The revocation as to the freehold estate is produced, not, as in some cases, in respect a completely new estate \* vested in the devisor, but by the intention to revoke: beyond the mere object of a jointure [\* 526] to vest in the devisor another estate, different from that, which he had before. In a Court of Equity there is no distinction, whether that intention appears by a legal conveyance, or is clearly demonstrated by agreement: by analogy to all other cases in a Court of Equity the intention having the same effect as the act done. The case of *Williams v. Owens*, though in one point of view certainly inconsistent with *Cave v. Holford*, is a strong authority for the heir with regard to the intention. The heir at law is never considered as a volunteer; and even a person, to whom, after providing for the objects of a settlement, the ulterior limitation is made, though perhaps a total stranger to the family, is considered a purchaser.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—I have already declared my opinion, that upon the case of *Cave v. Holford* this Will is revoked as to the freehold estate. The only remaining consideration is, whether any distinction can be made as to the copyhold. The cases, alluded to, *Rider v. Wager* (1), *Cotter v. Laver* (2), and *Knollys v. Alcock* (3), have established, that an agreement to convey revokes a devise as well as an actual conveyance. There is no doubt, I think, that if a surrender had been made to the uses of this settlement, the Will would have been revoked as to the copyhold estate; and I do not conceive, the case in 2 Blackstone (4) in any degree impeaches that position. There was not, and could not be, any question of revocation: the Will being the last \* act. The only question there was, whether the existing [\* 527] surrender to the use of the Will would support the devise; and it was held, that it would; though there has been an immediate surrender to other uses: but under which there had never been any admittance.

(1) 2 P. Will. 328.

(2) 2 P. Will. 622.

(3) *Ante*, vol. v. 648.

(4) Thrustout on the demise of *Gower v. Cunningham*, 2 Black. 1046.



It is said, that the marriage was a consideration for nothing more than the jointure to be settled upon the wife ; and that a Court of Equity would only have decreed, that a jointure should be secured to her. I have found no instance of a covenant, so partially executed. The intention is clear, not only that a jointure should be secured, but that it should be secured in the specified mode and form ; and that the copyhold estate should be settled in the same manner in every respect as the freehold.

Therefore, I think, the Court would have directed the covenant to be executed in the very terms : viz. a surrender to the uses of the settlement. This devise is consequently effectually revoked by the covenant to surrender ; as it would have been by an actual surrender to those uses.

The Decree was pronounced accordingly ; with a declaration, that the settlement was a revocation in Equity (1).

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1. THE leading doctrines and authorities as to revocations of wills, are stated, *ante*, in the notes to *Brydges v. The Duchess of Chandos*, 2 V. 417.

2. The decree made at the Rolls, in the principal case, was appealed from: see the report in 2 Swanst. 268—277. The Lord Chancellor said, that if the surrender of copyholds was, at law, a revocation of a previous testamentary disposition thereof, a covenant for such surrender would be a revocation in equity ; but, as the effect of an actual surrender was a pure legal question, his lordship directed a case to be made for the opinion of the judges of the Court of King's Bench. The certificate returned was, that the judges were of opinion the surrender made by *Guylott Cowherd*, of the copyholds to the uses of his marriage settlement, did not revoke the surrender to the use of his will, and the devise of such copyholds: see the proceedings at law reported in 3 Barn. & Ald. 462—470.

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(1) See this case on the Appeal, 2 Swanst. 268.

## TABLE OF CONTENTS.

---

### A

**ABANDONMENT.**—See Mines, 1.

**ABSOLUTION.**

Writ to absolve a person, unlawfully excommunicated.

Notice required. *Boraine's Case.* 346

**ACT OF PARLIAMENT.**

See Vendor and Vendee, 11.

**AGENT.**

See Counsel. Lien, 1. Principal.

**AGREEMENT.**—See Contract.

**ANNUITY ACT.**

See Vendor and Vendee, 11.

**ANSWER.**

See Pleading. Practice, 9, 10.

**ANCIENT WINDOWS.**

See Injunction, 5.

**APPEAL.**

1. Execution of a Decree not stayed by an Appeal without a special Order. 89

2. Decree, generally, not stayed by an Appeal. Upon special application, if unsuccessful, with Costs. *Waldo v. Caley.* 206

3. Appeal, generally, does not stay proceedings under a Decree.

The Costs upon application, follow the judgment, if unfavourable. *Willan v. Willan.* 216

4. Plaintiff, appealing from a Decree, dismissing the Bill, enti-

**APPEAL**—*continued.*

tled to the usual Order for the production and inspection of deeds. *Church v. Barclay.* 435

See Rehearing.

**APPEALS TO THE LORDS.**

See page 158.

**APPOINTMENT.**

1. Equitable jurisdiction upon illusory appointment; discretionary according to the circumstances. *Baz v. Whitbread.* 15

2. Execution of a power of appointment among children and grand-children by giving 100*l.* to one, and 2400*l.*, the residue of the fund, to the only other object, established under the circumstances: the former being at the time of appointment an uncertificated bankrupt; and other interests being given to him and his family by the instruments, creating and executing, the power. *Baz v. Whitbread.* 15

See Promotions.

**APPROPRIATION.**

Certificates of the East India Company, on payment into their treasury in India, and a Navy Bill, remitted, indorsed by the testator to his agent in England, being at the time a creditor, if

**ATTORNEY, ETC.—continued.**

they did not pass at Law by the indorsement, were, after the death of both parties, the agent having become bankrupt, held not to pass in Equity: the inference from the absence of evidence of a specific appropriation being against the assignees; who had obtained possession of all letters, &c. *Williamson v. Thomson.* 443

**ASSETS (Conversion of).**

The general rule for the conversion of personal property; bequeathed for life, with remainders over into the 3 per cents. held not to attach upon property of a testator, who died in India, under his Will, made there, invested by his executor in the Company's securities there: but on the arrival of the parties in this country a Decree was made, that it should be remitted, and invested accordingly. *Holland v. Hughes.* 111

**ASSOIL.—See Absolution.****ASSURANCE COMPANY.**

See Party, 7.

**ATTORNEY AND SOLICITOR.**

1. Solicitor ordered to pay all the Costs, occasioned by his refusing to appear for the Defendant at the hearing, pursuant to his undertaking, and the Costs of the application. *Cook v. Broomhead.* 133
2. Attorney cannot be changed without leave of the Court; whether he can relinquish the suit, though not paid, and as to the effect of taking security, *Quare.*

Effect of his notice to Defendant not to pay over money under a Decree or Judgment without satisfying his Costs. 281

3. A Solicitor, arrested on his way from his residence to Lincoln's Inn Hall, without deviation, for the purpose of attending a bankrupt petition, as Solicitor, discharged on personal examination

**ATTORNEY, ETC.—continued.**

by the Lord Chancellor: the oath administered by the Registrar: but to be entitled in the bankruptcy. *Castle's Case.* 412

See Bankrupt, 9. Counsel.

Lien, 1, 2, 3.

**AUTHORITY.—See Power.****B****BANKRUPT.**

1. A concerted act of bankruptcy not available, except for creditors not privy to it. *Ex parte Bourne.* 145
2. The object of Lord Erskine's General Order in Bankruptcy, 29th December, 1806, (Ante, Vol. XIII. 207,) to prevent dealing with a docket for the purpose, not of a Commission, but of another arrangement: a practice to be discountenanced. *Ex parte Bourne.* 145
3. A docket not to be struck without a solid ground of belief, that an act of bankruptcy has been committed. *Ex parte Bourne.* 145
4. Commission upon a concerted act of bankruptcy may be supported by another act. 148
5. Assignment of all property, though for the satisfaction of all the creditors, an act of bankruptcy. 148
6. Circumstances, amounting to an act of bankruptcy by keeping house: viz. not going to his counting-house, nor into the town, near which he lived; sending for his papers to his house: not going out; except taking an evening walk in the country. 149
7. Commission of bankruptcy established under strong circumstances of suspicion: particularly, that the affidavit and bond for the docket were written by the bankrupt; whose brother

**BANKRUPT—continued.**

- was the petitioning creditor. *Ex parte Steele.* 161
8. Costs to Commissioners in Bankruptcy made parties to a petition without sufficient ground : viz. for refusing to admit the affidavit of an absent creditor, proceeding at law ; not permitting the examination of the petitioning creditor by a person, who had not proved a debt ; and admitting the full proof of a creditor, claiming a lien on papers in his hands, as agent in town for the bankrupt, an attorney. *Ex parte Steele.* 161
9. An attorney, not having delivered his bill according to the Statute 2 Geo. II. though he cannot bring an action, may be the petitioning creditor in a Commission of bankruptcy : but his debt must be afterwards examined. 166
10. Joint creditors admitted to prove under a separate Commission of bankruptcy for the purpose of assenting to, or dissenting from, the certificate, not to receive dividends with the separate creditors. *Ex parte Taitt.* 193
11. Separate Commission of bankruptcy by a joint creditor. 195
12. Petition to restrain an action by Commissioners of Bankruptcy against the assignees for costs of defending an action against the Commissioners and messenger for false imprisonment, in which the Plaintiff was nonsuited, or for a contribution among the creditors dismissed.
- No distinction, exonerating creditors, who were absent ; proving by affidavit they adopt all the proceedings. *Ex parte Linthwaite.* 235
13. Warrant of Commissioners of Bankrupt to arrest a witness may issue at once on disobedience to their summons ; and does not require a second summons. 235, n.

**BANKRUPT—continued.**

14. A Commission of Bankruptcy against an uncertificated bankrupt, is, strictly, void.
- Formerly the course was to let joint and separate Commissions stand together : now either is superseded, as may best answer the ends of justice, by arrangement : notice being given to the creditors under the first Commission : the bankrupt in this instance having traded again in a distant place under another name, that notice was directed. *Ex parte Crew.* 236
15. Proof in bankruptcy under a covenant by the bankrupt in consideration of marriage immediately after the marriage, or whenever afterwards requested by the trustees, to transfer 2000*l.* stock, alleged to be standing in his name : though not the fact : but the specific time of the request must be ascertained. *Ex parte Campbell.* 244
16. Whether judgment for damages, in an action for breach of promise of marriage, by relation to the time of the verdict forms a debt, that will support a Commission of Bankruptcy, issuing, and the act of bankruptcy committed, in the interval, and as to the effect of the certificate upon such a debt, *Quare.*
- The Commission superseded ; with the offer of a case. *Ex parte Charles.* 256
17. Bankrupt, praying to supersede his Commission on the ground of infancy left to his action ; having traded two years as an adult : and the creditors resisting. *Ex parte Watson.* 265
18. General Order as to bankrupts' certificates. 318
19. General Order as to bankrupt petitions. 320
20. Commission of Bankruptcy may be superseded at any time after the first meeting upon consent of all the creditors, who

**BANKRUPT—continued.**

- had proved. *Ex parte Duckworth.* 416
21. Order in bankruptcy on petition for sale of premises, subject to an equitable mortgage: the General Order (8th March, 1794,) applying only to legal mortgages. *Ex parte Payler.* 443
22. Trader, having privilege of Parliament, by not paying money under an Order of Court commits an act of bankruptcy by Stat. 45 Geo. III. c. 124. 437
23. Discretion of the Great Seal to supersede a second Commission against an uncertificated bankrupt, and even, under circumstances, on the petition of the bankrupt; or not.  
The petition for that purpose of the petitioning creditor under the first Commission dismissed with costs, under the circumstances: fifteen years since the first Commission; during the last seven of which the bankrupt, who was his son in law, was permitted to carry on trade in another place. *Ex parte Lees.* 472
24. Inconsistency of the decisions, that a bankrupt, uncertificated, has no property; yet may acquire it by action. 474
25. Circumstances, under which a bankrupt uncertificated might petition to supersede a second Commission against him. 474
26. As to the distinction, that an objection, which a third person may take, cannot be taken by the bankrupt, *Quære*: especially with reference to criminal cases. 476

See Mortgage, 1.

**BANNS.**

See Marriage, 1.

**BARGAIN AND SALE (ENROLLING).**

See Vendor and Vendee, 11.

**BARON AND FEME.**

1. Securities obtained from a married woman, having property settled to her separate use, by a creditor of her husband, who by suppressing that fact procured himself to be appointed one of the trustees, his co-trustee not being a party to the transaction, set aside. *Dalbiac v. Dalbiac.* 110
2. Account of separate property not farther back than the husband's death; having lived together. *Dalbiac v. Dalbiac.* 110
3. Wife's reversion, which cannot fall into possession during the husband's life, as if it is upon his death, not assignable by him. 122
4. Married woman permitted to transact as to her separate property: but such transaction must be perfectly fair and open. 125
5. Injunction against an ejectment under a deed of appointment, as obtained by a husband from his wife by undue influence, oppression, &c. and an issue directed. *Peel v. —.* 157
6. Feme Covert, living apart from her husband, and holding herself out, and contracting debts, as a Feme Sole, not entitled to summary relief; but left to her plea of coverture. 266
7. Husband and wife, seised under the settlement for their lives successively with remainders in strict settlement, and to the heirs of the wife, having no issue, joined in a mortgage, by fine, declaring the ultimate use to the survivor.

Declaration, or clear intention, equivalent to it, is necessary to change the use; and no purpose appearing beyond the mortgage, the title of the wife was established against a claim under the husband surviving: but the Decree was reversed in the House of Lords. *Innes v. Jackson.* 356

**BARON AND FEME—continued.**

8. Stock, the property of a married woman, not reduced into possession, so as to be vested in her husband, by a transfer to him merely as a trustee. *Wall v. Tomlinson.* 413

See Ward of Court, 1.

**BARRISTER.**—See Counsel.

**BEQUEST.**—See Will.

**BIDDINGS (OPENED).**

See Practice, 6.

**BILL (CROSS).**

See Practice, 1.

**BILL OF REVIEW.**

1. Petition for leave to file a Bill of Review after a Decree, affirmed on Re-hearing, and pending an Appeal to the House of Lords, for the purpose of introducing evidence in answer to evidence, admitted by surprise, viz. not in answer to an interrogatory, nor the subject directly in issue, the Decree not being made upon that evidence, was refused with costs. *Willan v. Willan.* 72
2. Bill of Review, or a supplemental bill in nature of it, where the Decree has not been enrolled, upon new evidence, discovered since publication, not permitted, to introduce a new case; of which the party was sufficiently apprized to enable him with reasonable diligence to have put it upon the record originally. *Young v. Keighley.* 348
3. Grounds of Bill of Review: error apparent: new evidence, discovered since publication, as to a material fact. 350

## C

**CALENDAR.**—See Copyright.

**CHARITY.**

1. Trust by Will to pay the income to the testator's wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her with the advice and assistance of his trustees to lay

**CHARITY—continued.**

out one moiety in promoting charitable purposes, as well of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen or otherwise, as his wife shall judge most worthy and deserving objects; giving a preference always to poor relations.

The object is Charity in general; with a preference, but not confined, to poor relations: the distribution to be at the discretion of the wife, with the advice and assistance, not subject to the control, of the trustees.

*Waldo v. Caley.* 206

2. Legacy, to be laid out in land in Scotland for a Charity, established; being within the exception of the Statute 9 Geo. II. c. 36. *Mackintosh v. Townsend.* 330

**CHART.**—See Copyright

**CHILD (EN VENTRE).**

Limitation to a child *en Ventre.* 296

**CLERGYMAN.**—See Marriage.

**COMMITMENT.**

The parties under commitment cannot be heard except on petition. *Nicholson v. Squire.* 259

See Ward of Court, 2.

**COMPENSATION.**

See Contract, 1.

**COMPOSITION.**

See Creditor and Debtor, 1.

**CONSOLIDATION OF TITHE**

**CAUSES.**—See Tithe.

**CONTINGENT REMAINDER.**

See Devise, 2. Trust, 4.

**CONTRACT.**

1. Specific performance decreed, upon the bill of the purchaser, with compensation for a defect of title if to be ascertained, by reduction of the purchase-money: if not, or the plaintiff would so take it, with an indemnity: the Defendant the vendor, proposing an option to take it, as it was, or relinquish the contract:

**CONTRACT—continued.**

the defect consisting in the representation by the particular of a church lease for twenty-one years, with covenants for renewals to sixty-three years: the lease being actually for lives; and the covenants limited and contingent. *Milligan v. Cooke.* 1

2. Agreement decreed to be delivered up, on the ground, not of fraud, but surprise: neither party understanding the effect of it: viz. a lease, with covenant for perpetual renewal, at a fixed rent, of premises, held under a Church lease, renewable upon fines, continually increasing.

A single lease for twenty-one years refused: no terms of agreement for such an interest appearing; and under the circumstances permission to try the effect of it at law was refused. *Willan v. Willan.* 72

3. Distinction between carrying an agreement into execution and disturbing it when executed; also as to decreeing it to be delivered up, or leaving the party to make the most of it at law. 83

4. Where a Court of Equity, refusing to execute an agreement, leaves the parties to law. 86

5. To obtain a specific performance of a contract the subject must be proved, as described. *Daniels v. Davison.* 249

6. Plea to a Bill for specific performance of an agreement for a lease to the Plaintiff, and an injunction against an ejectment, &c. that the Plaintiff had since the Bill filed taken the benefit of an Insolvent Act, over-ruled. *De Minckwitz v. Udney.* 466

See Vendor and Vendee, 4.

**CONVERSION OF ESTATE.**

Devise of real estate in trust to sell: if a conversion to personal property, not absolutely, but for partial purposes, as the payment of debts, a resulting trust

**CONVERSION, ETC.—continued.**

as to the surplus for the heir: but as personal property. *Wright v. Wright.* 188

**COPYHOLD.**

1. The want of surrender supplied for a widow against a collateral heir, viz. a sister: whether provided for, or not.

As to a son, *Quare. Fielding v. Winwood.* 90

2. In supplying the want of surrender for a widow it is immaterial, how ample or scanty her provision may be. 92

3. Surrender supplied for younger children, the heir having a provision under the Will, without regard to the amount. *Garn v. Garn.* 268

4. Devise of copyhold supported by an existing surrender to the use of a Will notwithstanding an intermediate surrender to other uses; under which there had never been any admittance. 527

See Revocation.

**COPYRIGHT.**

Injunction against pirating a Court Calendar: the individual work creating copyright: though the general subject, as in the case of a map, or chart, is common. *Longman v. Winchester.* 269

**COSTS.—See Pauper, 1.****COUNSEL.**

Counsel and agent liable to costs for scandal and impertinence. 234

**COURT CALENDAR.**

See Copyright.

**COVENANT FOR PERPETUAL RENEWAL.**

See Landlord and Tenant, 2.

**CREDITOR AND DEBTOR.**

1. Though an agreement for a composition, generally, is not binding on the creditor, unless absolutely and strictly fulfilled, a bond-creditor, having concurred in a general resolution for a composition, to be secured by notes, was under the circum-

**CREDITOR, ETC.—continued.**

stances, with reference to the interest of the other creditors, restrained from taking execution in an action upon the bond, on non-payment of the notes, beyond the terms of the composition. *Mackenzie v. Mackenzie.* 372

2. Discharge by Habeas Corpus, from commitment under an attachment for breach of a Writ of Execution on a Decree for payment of money on account of a Devastavit, as executor committed before, though not ascertained by the Report, or decreed to be paid, till after the time, fixed by an Insolvent Act; of which the party had taken the benefit. *Wheldale v. Wheldale.* 376

See Fraud. Party, 3, 9.

**CROSS BILL.**—See Practice, 1.

**CROWN.**—See Mines, 2.

**D**

**DEBTOR.**—See Creditor.

**DECREE.**

Motion to open the enrolment of a Decree, and to stay proceeding under it, to give an opportunity of Appeal, refused: the Decree being made upon the merits: as at Law a judgment by default is vacated on motion; not a judgment on the merits. *Charman v. Charman.* 115

See Appeal, 1, 2.

**DEED.**

Deed construed as from the moment of execution; not by subsequent events. 156

See Practice, 12.

**DEMURRER.**

See Party, 2.

**DESTRUCTION.**

See Waste, 1.

**DEVISE.**

1. Proviso, that if any of the tenants for life in a devise and ex-

**DEVISE—continued.**

ecutory trust to convey in strict settlement shall become possessed of the family estate, the devise or limitation directed shall thereupon cease and become void, or not take effect, and the persons next in remainder under the said limitations or directions shall thereupon become entitled to the possession.

The first tenant in tail entitled under the proviso notwithstanding the descent of the other estate upon his father, the first devisee for life. *Stanley v. Stanley.* 491

2. Devise to trustees and their heirs in trust to receive the rents, &c. until A. shall attain twenty-one; and immediately after he shall attain twenty-one to convey to the use of A. for life, and from and after the determination of that estate by forfeiture or otherwise in his life to trustees and their heirs during his life upon trust to preserve the contingent uses; and after his decease to the use of his first and other sons in tail male; and for default of such issue, or in case of the death of A. before twenty-one, upon a similar trust for other persons. A. takes a vested remainder for life after an estate in the trustees for so many years as his minority may last. *Stanley v. Stanley.* 491

Direction to trustees to correct any defect or incorrect expression in the Will, and to form the settlement from what appears to them to be the testator's real meaning, does not authorize them to change the limitations. *Stanley v. Stanley.* 491

See Revocation.

**DISCOVERY.**

See East India Company. Evidence.

**DURESS.**

See Baron and Feme, 5.



## E

**EAST INDIA COMPANY.**

By-law of the East India Company, requiring a discovery by answer to a Bill in Equity as to transactions, upon which penalties were imposed, confined to the case of a Bill by the Company. *Paxton v. Douglas.* 239

**EQUITABLE RECOVERY.**

See Recovery, 1.

**EQUITABLE WASTE.**

See Waste, 8.

**ESTATE FOR LIVES.—See Intail.****EVIDENCE.**

1. Forgery not conclusive against a fact, proved by other evidence.

*Lloyd v. Passingham.* 59

2. The Fleet Register evidence, not as a Register, but a declaration upon the fact. *Lloyd v. Passingham.* 59

3. Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself: no inference to the truth of the fact. *Lloyd v. Passingham.* 59

4. By the Canon Law the Clergy are required weekly to form and sign the Registers, and annually to transmit a duplicate to the Ordinary. That duplicate is evidence. 63

5. Witness not compelled to answer interrogatories, having a direct tendency to subject him to penalties, &c. or having such a connection with them as to form a step towards it.

The question should not be made upon Exception to the Master's Certificate, that he had allowed the Interrogatories, but if the witness takes the objection to the Report, whether the Examination is or is not sufficient. *Paxton v. Douglas.* 239

6. Relaxation of the old practice for the Court to inform a witness, that he was not bound to answer. 242

**EVIDENCE—continued.**

7. Legacy to A. if in the testator's service at the time of his decease.

Parol evidence admitted to show, that, though she had quit-  
ted his house, she continued,  
and was considered by him as,  
in his service; and upon that  
evidence the legacy was estab-  
lished. *Herbert v. Reid.* 481

8. Evidence not admissible to alter a Will. *Herbert v. Reid.* 481

**EXCOMMUNICATION.**

See Absolution.

**EXECUTOR.**

See Assets (Conversion of). Rep-  
resentative. Trust, 5, 6.

**EXPECTANT HEIR.**

See Heir Expectant.

## F

**FACTOR.—See Lien, 5.**

**FEMALE WARD.**

See Ward of Court, 1.

**FEME.—See Baron.**

**FLEET REGISTER.**

See Evidence, 2.

**FORFEITURE.**

See East India Company. Ev-  
idence, 5.

**FORGERY.—See Evidence, 1.**

**FRAUD.**

Creditor, by suppressing his debt  
inducing another person to en-  
ter into a contract, not permit-  
ted to set up the debt even  
against the person, in whose fa-  
vor and at whose instance he  
made the suppression. 125

See Receiver.

## G

**GENERAL ORDERS IN BANK-  
RUPTCY.**

See pages 318, 19, 20; and  
Bankrupt, 18, 19.

**GUARDIAN.**

1. Appointment of guardian by an  
unattested Will made good by

**GUARDIAN—continued.**

a codicil, with three witnesses, on the same paper, referring to the Will, as annexed, making some alterations as to legacies, and confirming it in all other respects; as the case of a devise of land. *De Bathe v. Lord Fingal.* 167

2. Order, appointing a guardian without a reference, only where the property is excessively small. Refused where it amounted to 1500*l.* *Ex parte Wheeler.* 266

**H****HEIR.**

Rents and profits under a trust to accumulate, being in the event not disposed of, belong to the heir at law. *Stanley v. Stanley.* 491

See Conversion of Estate. Representatives.

**HEIR EXPECTANT.**

Protection in Equity to an expectant heir, dealing for his expectancy, approaching nearly to an incapacity to contract.

Relief against a very advantageous purchase from such a person without fraud; though mere inadequacy, unless from its grossness of itself evidence of fraud, is between persons, standing precisely equal, of no account.

The relief on payment of principal, interest, and costs; the purchaser being considered as a mortgagee. His Bill, to establish the purchase, dismissed with costs, except of depositions, used by the other party. *Peacock v. Evans.* 512

**HUSBAND.**—See Baron and Feme.

**I****ILLUSORY APPOINTMENT.**

See Appointment, 1, 2.

**IMPERTINENCE.**—See Counsel.

**INADEQUACY.**

See Heir Expectant.

**INDIA COMPANY.**

See East India Company.

**INFANT.**

See Bankrupt, 17. Ward of Court.

**INJUNCTION.**

1. Effect of an Injunction in the Court of Chancery: before action commenced staying all proceedings at law: after action commenced permitting the Defendant to call for a plea, and proceed to judgment at law, if in a condition to do so; or, if not, to do only what is necessary to enable him to do so; restraining execution.

Therefore, after bail excepted to, ruling the Sheriff to bring in the body a breach of the injunction. *Bullen v. Ovey.* 141

2. Injunction extended to stay trial on affidavit, that the Plaintiff is advised and believes, that he cannot safely proceed to trial until the answer. *Partington v. Hobson.* 220

3. To extend an Injunction to stay Trial the affidavit must state belief, not merely that the Plaintiff cannot safely go to Trial, but that the Answer will furnish discovery material to his defence in the Action. *Appleyard v. Seton.* 223

4. Service of subpoena necessary in the case of special injunction; but the practice having been unsettled, the Defendant was put to dissolve upon the merits: and the Plaintiff permitted to show cause by affidavit. *Attorney General v. Nichol.* 338

5. Injunction against darkening ancient windows not in every case, affecting the value of premises, that would support an action. The effect must be, that material injury, amounting to nuisance, which should, not only be redressed by damages, but

**INJUNCTION**—*continued.*

upon equitable principles prevented. *The Attorney General v. Nichol.* 338

See Partner, 3. Vendor and Vendee, 4.

**INROLMENT ACT.**

See Vendor and Vendee, 11.

**INROLMENT OF DECREE.**

See Decree.

**INSURANCE COMPANY.**

See Party, 7.

**INTAIL.**

*Quasi intail of an estate for lives barred by release.* 313

**INTEREST.**—See Legacy, 1.

**INTERPLEADER.**

1. Questions arising on bills of interpleader are disposed of in various modes, according to the nature of the question, and the manner, in which it is brought before the Court. *Angell v. Hadden.* 202

2. Interpleading bill is considered as putting the Defendants to contest their respective claims; as a bill by an executor or trustee to obtain the direction of the Court upon the adverse claims of the Defendants. Therefore at the hearing, if the question between the Defendants is ripe for decision, the Court decides it; and, if not ripe for decision, directs an action, or an issue, or a reference to the Master; as best suited to the nature of the case. Accordingly upon objections under the Annuity Act a reference was directed, whether proper memorials were enrolled, and to state the priorities of such as are valid. *Angell v. Hadden.* 202

3. Interpleader bill by a tenant to ascertain, to which of two claimants he was to pay his rent. The one establishing his title by evidence, the other making default at the hearing, payment decreed to the former; and a perpetual injunction against the other. 203

**J**

**JOINT AUTHORITY.**

See Power, 1.

**JUDGMENT.**—See Mortgage, 1.

**JUDGMENT VACATED.**

See Decree.

**JURISDICTION.**

Bill for payment of a promissory note, which had been cut in two parts, one being produced, and the other alleged to be lost, and offering an indemnity, dismissed; as, proving the loss, an action might be maintained. *Mossop v. Eadon.* 430

See Contract, 3, 4.

**K**

**KINDRED.**—See Trust, 2.

**KING (THE).**—See Mines, 2.

**L**

**LANDLORD AND TENANT.**

1. Tenancy at will may be determined at any time, as to any new contract: not as to any thing, which during the tenancy remained a common interest. 57

2. Covenant for perpetual renewal valid. 84

3. Injunction to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage, and from removing the crops, manure, &c. except according to the custom of the country. *Onslow v. ———.* 173

4. Tenancy at will determined by an agreement to purchase. 252

5. Tenancy from year to year favored. 252

6. As to relief against an ejectment by a landlord for breach of a covenant to repair, *quare.* *Hill v. Barclay.* 402

7. Relief against a right of entry on breach of covenant by non-payment of rent. 405

**LANDLORD, ETC.—continued.**

8. No specific performance of a covenant to repair. 405

See Interpleader, 3.

**LEASE.**

1. Bequest of leasehold premises, "and all my estate term and interest therein."

The interest, acquired under a subsequent renewal of the lease, does not pass. *Slatter v. Noton.* 197

2. Distinction between bequests of leasehold estate by words in the present and in the future tense, as confined to the existing, or comprehending a future, interest. 199

**LEGACY.**

1. Charge by Will on real estate of simple contract debts of another person considered as a legacy, carrying interest from the death of the testator at *4l. per cent.* *Shirt v. Westby.* 398

2. Legacy in a foreign country and coin, as *Sicca Rupees* by a Will in India: if paid by remittance to this country, the payment must be according to the current value of the Rupee in India, without regard to the exchange, or the expense of remittance.

So as to other countries. *Cockerell v. Barber.* 461

See Evidence, 7. Vesting, 3.

**LESSOR AND LESSEE.**

See Landlord.

**LIEN.**

1. Lien of the agent in town upon the papers in his hands for what is due to him, as agent in the cause, from the Solicitor in the country. 164

2. Attorney's lien generally on papers in his possession: not limited to the occasion, on which they were delivered, without special agreement. *Ex parte Sterling.* 258

3. Solicitor's lien on papers superseded by taking security. *Cowell v. Simpson.* 275

4. Vendor's lien for the purchase-

**LIEN—continued.**

money: lien upon goods in different trades for work upon them, for the general balance; and as to the effect of taking security. 278

5. Factor's lien, both for his expenditure on the goods in his possession, and his general balance, lost by a special contract for a particular mode of payment. So, in various trades. 280

**LIGHTS (ANCIENT).**

See Injunction, 5.

**LORDS.—See Appeals.****LOSS OF NOTE.—See Jurisdiction.****M****MAINTENANCE.—See Pauper, 5.****MAP.—See Copyright.****MARRIAGE.**

Clergyman, celebrating marriage by banns without making the inquiry, directed by the Marriage Act, liable to ecclesiastical censure, at least: perhaps to other consequences.

The marriage however good; though neither party was resident in the parish. *Nicholson v. Squire.* 259

See Ward of Court, 1.

**MARRIED WOMAN.**

See Baron and Feme.

**MEMBER OF PARLIAMENT.**

See Bankrupt, 22. Practice, 11.

**MINES.**

1. The inference of abandonment of a right from *non-user* not applicable to the case of mines. 392

2. Whether under a mere reservation of Royal Mines, without a right of entry, the Crown can grant a license to enter on the land for the purpose of working them, *Quere.* 396

See Vendor and Vendee, 8.

**MISTAKE.—See Contract, 2.****MORTGAGE.**

1. First and second mortgagees: the mortgagor a Bankrupt.

**MORTGAGE—continued.**

The first mortgagee entitled to tack a subsequent judgment, docketed, though no execution had issued, at the time of the bankruptcy. *Baker v. Harris.*

397

2. Receiver upon a mortgagee in possession; who cannot ascertain the debt, due to him. *Codrington v. Parker.*

469

See Bankrupt, 21.

**MORTMAIN.**—See Charity, 2.

**N****NE EXEAT REGNO.**

Writ of Ne exeat Regno upon the concurrent jurisdiction, in account; though bail might be had at law.

Against a positive affidavit the Defendant's affidavit, or evidence of the Plaintiff's admission, that no debt is due, will not avail.

The affidavit of a threat or intention to go abroad must be positive; not upon information and belief. *Jones v. Alephsin.*

**NEGATIVE PLEA.** 470

See Pleading, 5.

**NEXT OF KIN.**—See Trust, 2.

**NON-USER.**—See Mines, 1.

**NOTE LOST.**—See Jurisdiction.

**NOTICE.**

1. Reasonable notice a question for the Court or Jury. 56

2. The possession of a tenant is notice to a purchaser of the actual interest he may have, either as tenant or, farther, as in this instance, by an agreement to purchase the premises. *Daniels v. Davison.*

249

**O****OPENING BIDDINGS.**

See Practice, 6.

**ORDERS (GENERAL, IN BANKRUPTCY).**—See pages 318, 19, 20; and Bankrupt, 18, 19.

**ORNAMENTAL TIMBER.**

See Waste, 8.

**P****PARISH REGISTER.**

See Evidence, 4.

**PARLIAMENT (ACT OF).**

See Vendor and Vendee, 11.

**PARLIAMENT (MEMBER OF).**

See Bankrupt, 22. Practice, 11.

**PARTNER.**

1. Partnership without any provision as to its duration may be determined without previous notice; subject to the accounts to wind up the concern. *Peacock v. Peacock.*

49

2. Partnership, without any stipulation as to the proportions: the partners entitled in equal moieties. *Peacock v. Peacock.*

49

3. Affidavits admitted on motion, after Answer, for an Injunction and Receiver in the case of partnership, by analogy to waste. *Peacock v. Peacock.*

49

See Party, 9.

**PARTY.**

1. The strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient: as in the case of a very numerous association in a joint concern; in effect a partnership. *Cockburn v. Thompson.*

321

2. Defect of parties the subject of Demurrer, or Plea; as it appears, or not, on the face of the Bill. *Cockburn v. Thompson.*

321

3. Distinction between partners and creditors, and between general and scheduled creditors, by analogy to the rule at law, that a Plea in abatement must show the proper party. 325

4. Where it has been held sufficient to bring before the Court the first person, having an estate of inheritance. 326

5. All obligors in a joint and several bond, principal and sureties, must be parties generally.

Exception, where the surety

**PARTY—continued.**

is insolvent; or has paid nothing. 326

6. Generally, a residuary legatee must bring before the Court all persons, interested in the residue.

Exception, where not necessary or convenient. 328

7. Various cases, where parties dispensed with: Bills by or against some tenants of a manor; as for suit to a mill, &c. some parishioners for tithes, or a *modus*: societies for insuring each other; which is not within the Stat. 6 Geo. I. c. 18. 328

8. Plaintiff cannot put off the cause, for defect of parties, without consent, or a special ground; as, that he was not aware of the existence of such parties. *Innes v. Jackson*. 356

9. Parties, dispensed with for convenience in the first instance, coming in after institution of the suit, must have the opportunity of supporting their interests, re-hearing, &c.: a creditor, for instance; and, if partner with the debtor, subject to account. 327

**PAUPER.**

1. Costs to a pauper.

Whether more than out of pocket, *Quære*. *Frost v. Preston*. 160

2. Plaintiff a pauper. Costs of impertinence, expunged from the Answer, ordered to be taxed as *Dines* costs, to be paid into Court. *Ratray v. George*. 232

3. Different decisions as to Costs to a pauper. 233

4. Costs against a pauper for scandal. 234

5. Improper and vexatious conduct in a former suit, or a subscription, though liable to be impeached as maintenance, no ground for dispaupering. *Corbett v. Corbett*. 407

6. Practice at law as to suing in *forma pauperis*. 407

**PAUPER—continued.**

7. Pauper not proceeding to trial, after giving notice, dispaupered, or not permitted to proceed. 408

8. Whether proceedings would be stayed in an action by a pauper, until payment of Costs of a non-suit in a former action for the same cause, as a pauper or not, *Quære*. 410

**PENALTY.**

See East India Company. Evidence, 5.

**PERPETUAL RENEWAL.**

See Landlord and Tenant, 2.

**PLEADING.**

1. Defendant, pleading purchase for valuable consideration without notice, must aver, that the vendor was seised: and was in possession: which would be satisfied by the possession of the tenant. 252

2. Negative Plea. To a Bill for an account of stone taken from the Plaintiff's quarry, under a promise to account, alleging assurances, that accounts were kept, Plea, denying only the promise to account, but not that the accounts had been kept, over-ruled. *Jones v. Davis*. 262

3. Plea, filed under an Order for time to answer, regular. *De Minckwitz v. Udney*. 355

4. Defendant, refusing a full discovery, not by Plea or Demurrer, but by Answer, compelled to make a full Answer: and, on motion, to produce books, &c. *Somerville v. Mackay*. 382

5. Negative Plea. 387

**POSTHUMOUS CHILD.**

See Child en ventre.

**POWER.**

1. Joint authority determined by the death of one. 45

2. Devise and bequest of real and personal estate in trust to pay the rents, dividends, &c. to the separate use of a married woman for life: and after her decease to convey, &c. according

**POWER—continued.**

to her appointment by deed or will; with a limitation over, in case of her death in the life of the testatrix, or in default of appointment.

Absolute property: notwithstanding the indication of an intention, that the estate should remain in the trustee for her life, with powers, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. *Barford v. Street*. 135

See Appointment. Trust, 2. Will, 1.

**PRACTICE.**

1. After Answer not of course to enlarge publication until Answer to a cross Bill. *Dalton v. Carr*. 93
2. Order, obtained by Plaintiff, under the usual undertaking to speed his cause, for liberty to withdraw his replication, and amend the bill, discharged with costs. *Pitt v. Watts*. 126
3. Order to dismiss the bill for want of prosecution, after three terms without replication of course, without notice; and pending an Injunction, staying execution. *Naylor v. Taylor*. 127
4. Motion to enlarge publication in the original cause until answer to a cross bill, the original cause being set down for hearing, and the cross bill filed after rules for passing publication, refused with costs. *Cook v. Broomhead*. 133
5. Biddings opened upon a second application by the same person: the purchaser not appearing upon notice. *Preston v. Barker*. 140
6. Order, dismissing the bill for want of prosecution, after three terms, without replication, of course, without notice; and not discharged upon special circumstances, except on payment of costs. *Jackson v. Purnell*. 204

**PRACTICE—continued.**

7. Order by one Defendant to examine another, not of course after, as before, a Decree.

In a special case, to ascertain, which trustee actually received money, all having signed the receipt, the Court refused to discharge the Order, made two years before; but required the examination without delay.

*Franklyn v. Colquhoun*. 218

8. Different practice of the Courts of King's Bench and Common Pleas as to putting off a trial in the absence of a witness: the former being satisfied with an affidavit, that the party safely go to trial without the evidence: the latter requiring the reason. 222

9. After process to a Serjeant at Arms issued, but not executed, answer, and exceptions submitted to by a note between the clerks in Court, but, no farther answer being put in, the Serjeant at Arms ordered to go. *Waters v. Taylor*. 417

10. Defendant, taken upon the process for want of an answer, is on putting in an answer entitled to be discharged, without waiting for the Report, that it is sufficient. 478

11. Member of Parliament refusing to enter an appearance, the Court appointed a clerk in Court to enter an appearance for him under Statute 45 Geo. III. c. 124. s. 3. *Reed v. Phillips*. 436

12. The object of the bill being to set aside deeds, the Court will not, on motion, go beyond the usual liberty to inspect, &c. and for production at the hearing, by an Order to deposit them with the Master for safe custody, without a special case establishing danger, that they may not be produced. Therefore, where most of the circumstances, relied upon, viz. varia-

**PRACTICE—continued.**

tion in two deeds, appeared upon the answer, the Order was limited to production at the hearing. *Beckford v. Wildman.* 438

See Appeal, 4. Decree. Evidence, 5, 6. Guardian, 2. Injunction, 1, 2, 3, 4. Partner, 3. Receiver.

**PRINCIPAL AND AGENT.**

Ante, Vol. XIII. 47.

Account against a confidential agent, in possession of estates since 1780, without giving any account to his principal, residing in Ireland; and inquiries into the circumstances of a lease, granted under his direction, and in which he took an interest, and a reversionary lease to himself. *Lady Ormond v. Hutchinson.* 94

**PRINCIPAL AND SURETY.**

See Party, 5.  
**PRIVILEGE.**

See Attorney and Solicitor, 3.  
**PROCESS.**—See Bankrupt, 9, 10.  
**PROMISSORY NOTE LOST.**

See Jurisdiction.

**PROMOTIONS.**—See pages 160, 317.

**PURCHASER.**—See Contract, 1. Notice, 2. Vendor.

**R****RECEIVER.**

A Receiver may be appointed against the legal title in a strong case of fraud upon affidavits: but under the circumstances of this case, an application after answer, for that purpose, an Injunction against committing waste and disposing of the estate was refused. *Lloyd v. Pasingham.* 59

See Mortgage, 2. Partner, 3.

**RECOVERY.**

1. Equitable recovery valid; though the tenant in tail was not at the time in actual receipt

**RECOVERY—continued.**

of the rents; which the trustee paid over to others under a Decree, afterwards reversed. *Lord Grenville v. Blyth.* 224

2. No analogy between legal and equitable recovery with reference to possession with, or adverse to, the title.

To make a legal tenant to the præcipe possession by seisin in fact or law is absolutely necessary: otherwise no legal freehold is acquired: but in the other case, as it is not the object, nor can ever be the effect, of the conveyance to transfer the possession, but only to pass the equitable interest, if he has a sufficient equitable interest, viz. an equitable estate tail, the recovery is well suffered. 230

**REGISTER.**—See Evidence, 2, 4.  
**REGISTRY ACT.**

See Vendor and Vendee, 10, 11.

**RE-HEARING.**

Generally, there can be only one re-hearing. 214

**RELATION.**—See Trust, 2.

**REMAINDER** (Contingent or Vested.)

See Devise, 2. Trust, 4.

**RENEWAL.**

See Landlord and Tenant, 2. Lease, 1.

**RENT.**—See Landlord and Tenant, 7.

**REPAIRING COVENANT.**

See Landlord and Tenant, 6, 8.

**REPRESENTATIVES.**

Lessee for years, with an option at certain periods to purchase; making that option, was considered owner *ab initio*, for the benefit of the heir: the price to be paid by the executor. 253

**RESIDUE.**—See Party 6. Will, 3.

**RESULTING TRUST.**

See Conversion of Estate.

**REVIEW.**—See Bill of Review.

**REVOCATION.**

Devise revoked by a conveyance to trustees and their heirs to secure a jointure, and, subject to



**REVOCATION—continued.**

a term for that purpose, to the  
devisor, and his heirs, with a  
covenant to surrender copyhold  
estates to the same uses. *Vawser*  
*v. Jeffrey.* 519

**ROYAL MINES.**

See Mines, 2.

**S****SALT WORKS.**

See Vendor and Vendee, 8.

**SCANDAL.**

See Counsel. Pauper, 4.

**SCHEDULED CREDITORS.**

See Party, 3.

**SCOTLAND.—See Charity, 2.****SEISIN.—See Pleading, 1.****SEPARATE PROPERTY.**

See Baron and Feme.

**SERJEANT AT ARMS.**

See Bankrupt, 9.

**SERVICE.—See Injunction, 4.****SHIP REGISTRY ACT.**

See Vendor and Vendee, 11.

**SOLICITOR.—See Attorney.****SPECIFIC LEGACY.**

See Will, 3.

**SPECIFIC PERFORMANCE.**

See Contract.

**SUBPCENA.—See Injunction, 4.****SUPPLEMENTAL BILL, IN NA-  
TURE OF A BILL OF REVIEW.**

See Bill of Review, 2.

**SUPPLY OF SURRENDER.**

See Copyhold.

**SURETY.—See Party, 5.****SURPRISE.—See Contract, 2, 3.****SURRENDER.—See Copyhold.****T****TACKING.—See Mortgage, 1.****TENANT.—See Landlord.****TENANT AT WILL.**

See Landlord and Tenant, 4.

**TENANT FROM YEAR TO YEAR.**

See Landlord and Tenant, 5.

**TENANT IN COMMON.**

See Waste, 1.

**TIMBER.—See Waste.****TITHE.**

Reference, whether several tithe  
causes should be consolidated,  
not of course, before answer.  
*Keighley v. Brown.* 344

**TITLE.—See Vendor.****TREES (ORNAMENTAL).**

See Waste, 8.

**TRIAL.**

See Injunction, 2. Practice, 8.

**TRUST.**

1. Trust not disappointed by the failure or negligence of the trustee. 26
2. Residuary devise and bequest for such of the testator's relations and kindred in such proportions, &c. as his executors should think proper; recommending and advising his said trustees and executors to give the greatest share to such person and persons, who in their opinion and judgment should appear to them to be his nearest relations and the most deserving; declaring his intention not to control their discretion; but that every thing relative to that disposition, who were his relations and the proportions, should be entirely in the discretion of the said trustees and executors, and the heirs, executors and administrators, of the survivor of them.

A trust, and a power. The ground of the power being personal confidence, it is *prima facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; and cannot be executed by the devisees and executors, for that specific purpose only, of the surviving trustee. A trust therefore, executed by the Court for the next of kin at the death of the testator, according to the Statute of Distributions. *Cole v. Wade.* 27

3. Trustees to preserve contingent

**TRUST**—*continued.*

remainders, joining in a recovery held, with reference to the circumstances and occasion, no breach of trust. *Moody v. Walters.* 283

4. Generally, trustees joining to destroy the contingent remainders, before the tenant in tail is of age, a breach of trust. 307
5. Executors and trustees charged for negligence by joining in a transfer to a co-executor upon his groundless representation, that it was required for debts: but not liable so far as they can prove the application to that purpose; though he possessed other funds, not through them; which funds he wasted. *Lord Shipbrook v. Lord Hinchinbrook.* 477
6. As to the cases, breaking down the distinction between executors and trustees joining in an act, by which one obtains and misapplies the fund, that executors are all liable, trustees not, as the former need not, and the latter must, join, *Quere.* 379  
See Conversion of Estate. Devise.

## U

**UNDERWOOD.**—See Waste, 5.

**USURY.**

Relief against usury upon the terms of paying what is due. 124

## V

**VACATING JUDGMENT.**

See Decree.

**VENDOR AND VENDEE.**

1. Objection to title by a purchaser under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors, and others, coming in within a limited time after the date of the deed, or dis-  
VOL. XVI. 25

**VENDOR, ETC.**—*continued.*

abilities removed, over-ruled upon the tenor of the deed; implying, that the receipt of the trustees should be a discharge. *Balfour v. Welland.* 151

2. The doctrine as to binding a purchaser to see to the application of the money by trustees has been extended farther than any sound equitable principle will warrant. 156
3. Whether, after a contract for sale of an estate, the vendor, selling to a purchaser for valuable consideration, without notice, is not accountable for the money as a trustee, *Quere. Daniels v. Davison.* 249
4. Injunction restraining vendor, Defendant to a Bill for specific performance, from conveying the legal estate. *Echloff v. Baldwin.* 267
5. Purchaser not compelled to take a doubtful title. *Stapylton v. Scott.* 272
6. No objection to a purchaser, that the defect of title appeared on the abstract, delivered before he filed his Bill. *Stapylton v. Scott.* 272
7. Outstanding term, to attend the inheritance, the trusts being performed, may be an objection to the conveyance: not to the title. *Berkeley v. Dann.* 381
8. Reservation of salt-works, mines, &c. in 1704, with a right of entry, though no instance of any claim, and the title had been transferred in 1761, without such reservation, upon the usual covenants held an objection, giving a right to compensation: the purchaser not insisting upon it farther. *Seaman v. Vawdrey.* 390
9. Purchaser bound by notice of a judgment, though not docketed. *Davis v. The Earl of Strathmore.* 419
10. Purchaser within the Registry Act (7 Ann. c. 20.) bound by

**VENDOR, ETC.—continued.**

notice of a deed, not registered. 427

11. Distinction between Acts of Parliament, denying legal effect to instruments, as the Act for inrolling Bargains and Sales, and the Registry Act, (7 Ann. c. 20) and Acts, declaring instruments void to all intents; as the Annuity and the Ship Registry Acts. Notwithstanding the former, the party is bound in Equity by the contract. 428

12. Covenant upon a conveyance in fee with the grantors, lessees of water-works, not to sell or dispose of water from a well to the injury of the proprietors of the said water-works, their heirs, executors, administrators, and assigns.

Whether the covenant runs with the land, so as to bind, and be enforced by, assignees, whether it is contrary to the policy of the Law, and as to the effect of a renewal of a lease, *Quere*.

The parties left to Law, and a Demurrer allowed, from the inconvenience of enforcing such a covenant by injunction. *Collins v. Plumb*. 454

See Contract, 1. Lien, 4. Notice, 2. Pleading, 1.

**VESTED REMAINDER.**

See Devise, 2.

**VESTING.**

1. Trust by Will, subject to an interest for life, to pay and transfer to the testator's nephew and nieces, equally at twenty-one; with survivorship in case any should die, before his or their shares should become payable; and a limitation over, in case all should die, &c.

Vested interest at the age of twenty-one, before the death of the tenant for life. *Hallifax v. Wilson*. 168

2. Trust to pay the dividends of stock to the testatrix's niece for life, and after her death to di-

**VESTING—continued.**

vide the capital among the brother and sisters of the testatrix, and in like manner to the survivors or survivor of them. The shares of those, who died in the life of the niece, passed to their representatives. 171

3. Legacy at the decease of a person, entitled to the fund, out of which it is given, vested immediately; and payment only postponed. *Blamire v. Geldart*. 314

**W****WARD OF COURT.**

1. Under a settlement on marriage of a female ward of Court the husband, committed and prosecuted, having in consideration of receiving a certain part of her fortune, the value of which was taken by estimation, released all right and interest in the residue, was thereby deprived of all farther interest; and not permitted therefore on suggestion, that the estimation was not fair, to attend the account, directed against the executors. *Pearce v. Crutchfield*. 48

2. Commitment for eloping with a ward of the Court; and against another person for assisting: ignorance, that she was a ward of Court not admitted as an excuse. *Nicholson v. Squire*. 259

**WASTE.**

1. Injunction against waste between tenants in common, on the ground, that one was occupying tenant to the other: otherwise not, except as to destruction. *Twort v. Twort*. 128
2. Equitable waste by cutting trees, planted for ornament. 132

3. Residue bequeathed in trust to be laid out in real estates to be settled to the same uses as es-

**TRUST—continued.**

tates devised to the trustees for life successively without impeachment of waste; with various limitations in strict settlement: all the estates for life being without impeachment of waste; and the ultimate remainder in fee.

The trustees having laid out part of the fund in an estate with a considerable quantity of timber upon it, taking that to be a sound exercise of discretion, the first tenant for life cannot cut the whole.

As to the consequence, whether, if the trustees are not by their character prevented from taking any benefit, the tenant for life may have any and what proportion, of the timber, and how the excess is to be disposed of, *Quere. Burgess v. Lamb.* 174

4. Equitable waste has not been extended beyond trees planted or growing for ornament, as in avenues or vistas, to timber merely ornamental: viz. an extensive wood. *Burgess v. Lamb.* 174

5. Cutting timber, where necessary for the growth of underwood, not waste. 179

6. Land devised to be sold, the money to be laid out in other estates, to be settled: the rents and profits until sale to go to the persons, entitled to the estates, to be purchased. Tenant for life without impeachment of waste cannot cut timber on the estate to be sold. 180

7. Right of tenant for life without impeachment of waste to cut timber, generally, in a husband-like manner, independent of the effect upon the beauty of the place, except equitable waste. 185

**TRUST—continued.**

8. Equitable waste not to be extended. 185

9. Injunction against cutting ornamental timber, upon the principle of equitable waste, extended to trees, planted for the purpose of excluding objects from view. *Day v. Merry.* 375

See Landlord and Tenant, 3.

**WIDOW.**—See Copyhold, 1, 2.

**WIFE.**—See Baron and Feme.

**WILL.**

1. Express bequest, or power, not controlled by the reason assigned: which, though it may aid the construction of doubtful, cannot warrant the rejection of clear, words. 46

2. Residuary bequest to A. "in case she should have legitimate children; in failure of which" to go over.

A. having only one child born alive, who died before her, entitled absolutely. *Wall v. Tomlinson.* 413

3. General residuary disposition of real and personal estate, "not herein before specifically disposed of" held to comprehend specific legacies lapsed: the word "specifically" being construed "particularly." *Roberts v. Cooke.* 451

See Devise. Evidence, 7.  
Lease, 1, 2. Legacy. Revocation.

**WINDOWS (ANCIENT).**

See Injunction, 5.

**WITNESS.**—See Evidence.

**WRIT OF ABSOLUTION.**

See Absolution.

**WRIT OF NE EXEAT REGNO.**

See Ne Exeat Regno.

**Y****YOUNG HEIR.**

See Heir Expectant.

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**END OF THE SIXTEENTH VOLUME.**

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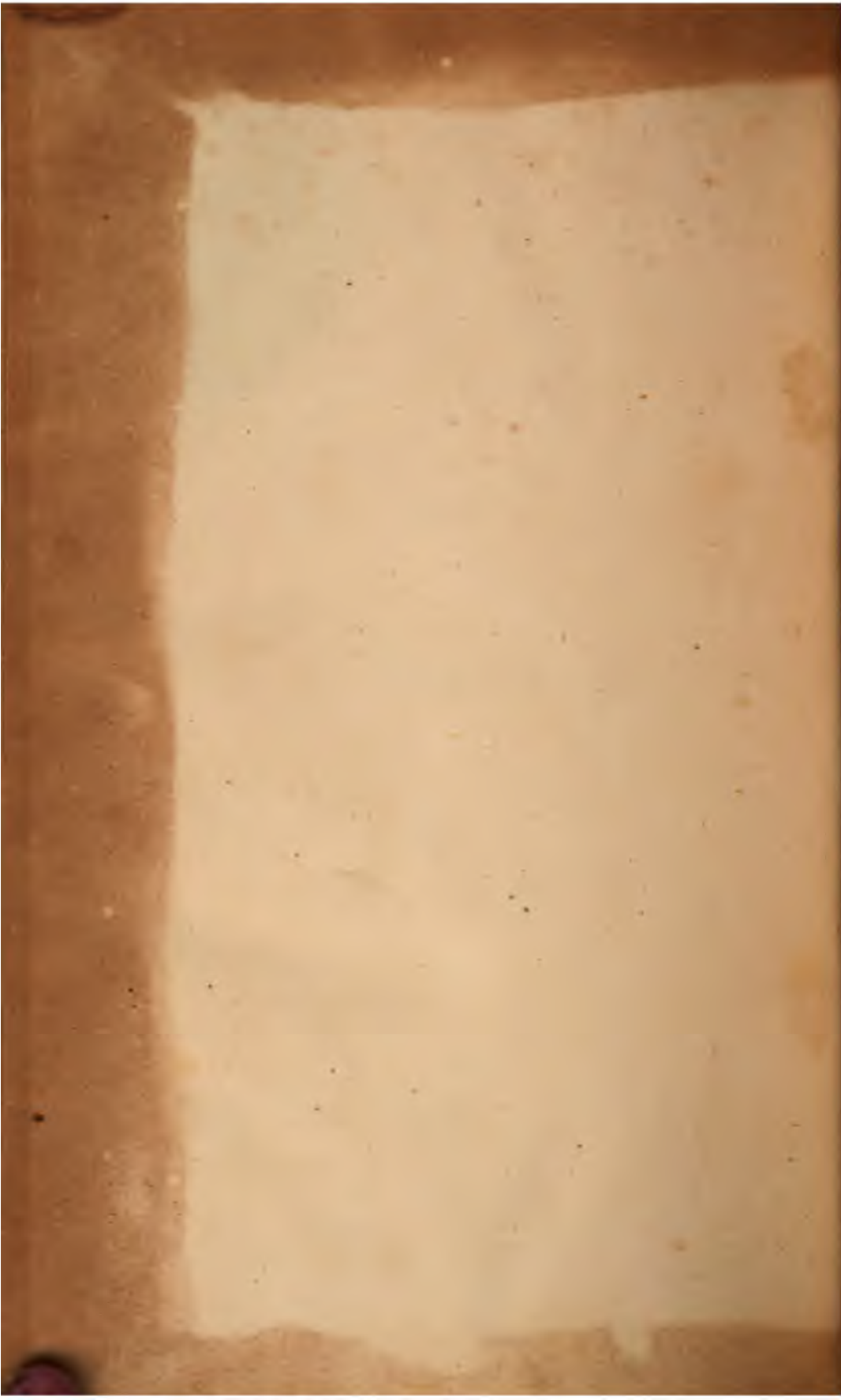
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